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REPORTS OF CASES

DECIDED IN THE

COURT OF PROBATE

AND IN

THE COURT FOR

Divorce and Matrimonial Causes.

WITH TABLES OF THE NAMES OF CASES, AND
INDEXES TO THE PRINCIPAL MATTERS.

BY

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TABLE OF CASES REPORTED.

IN THE COURT OF PROBATE.

Page

BAILEY, ELIZA, in the Goods of.
Will.—Verdict of *Felo de Se.*—Title to Probate 156

BAILEY, MARIA, in the Goods of.
Will of Married Woman.—Husband surviving.—No Executor.—Title to Grant 135

BAKER *v.* BAKER.
Attachment.—Married Woman.—Administratrix 380

BAYLIS, EDWARD, in the Goods of.
Intention to appoint Executors.—Bad for uncertainty . . 613

BENBOW, WILLIAM, in the Goods of.
Will.—Codicil.—Citation of Parties interested under.—Practice 488

BERNARD, WILLIAM HENRY, in the Goods of.
Affidavit in Foreign Parts.—Description of Deponent.—Practice 489

BRANDRETH *v.* BRANDRETH AND WIFE.
Suit for Revocation of Probate.—Practice as to delivering Issue.—Moving for Directions as to Trial and Issues to Assizes 446

BROWNING, JAMES, in the Goods of.
Administration.—21 Hen. VIII. c. 5, s. 3.—Joint Grant to a Widow and to a Person entitled in Distribution refused.—Probate Act, s. 73 634

BURCH, ELEANOR, in the Goods of.
Administration.—Attorney.—Principal resident in England 139

Page

CLARKINGTON, CHARLES, in the Goods of.
Limited Administration *ad colligenda bona*.—Power of Administrator 380

CLARKSON *v.* CLARKSON AND OTHERS.
Testamentary Papers.—Destruction without Intention to revoke.—Probate of Draft 497

CLARKSON *v.* WATERHOUSE.
A Married Woman.—Liability for Costs.—Practice . . . 378

CLEVERLY AND ANOTHER *v.* GLADDISH.
Administration *de bonis non*, with Will annexed.—Fund in Court of Chancery.—Sureties to Administration Bond dispensed with.—Amount of Estate 335

COLEMAN, HENRY HART, in the Goods of.
Probate.—Erasure 314

COLLIER, THOMAS, in the Goods of.
Executor out of Jurisdiction.—Grant under 38 Geo. III. and Probate Acts.—Personal Representative of Legatee . 444

COURT, MICHAEL, in the Goods of.
Will.—Inaccurate Language.—Probate 485

CRISPIN *v.* DOGLIONI.
Interest to oppose Will.—Judgment of Foreign Court.—Demurrer 17

CRISPIN *v.* DOGLIONI.
Testamentary Suit.—Issues.—Mode of Trial 493

DA SILVA, SOLOMON MENDES, in the Goods of.
Probate.—Conditional Codicil 315

DE LA FARQUE, LOUISA MARIA, in the Goods of.
Administration Bond.—Sureties dispensed with.—Probate Act, s. 82 631

DEPIT AND CHAPOT *v.* DELERIELEUSE.
Bankruptcy of Domiciled Frenchman.—Sale of Debts by Assignee.—Application for Administration to Purchasers of a Debt due from a Resident in London 131

DOUCE, THOMAS, in the Goods of.
Execution by Mark.—Wrong Name.—Probate 593

Page

DRINKWATER, JOB, in the Goods of.
Limited Grant of Administration.—73rd Section of Probate Act 611

DRUMMOND, HENRY, in the Goods of.
Will.—Incorporation by Reference 8

DUANE, THOMAS, in the Goods of.
Will.—Clause introduced *per Incuriam*.—Probate . . . 590

DYKE, QUEEN'S PROCTOR, *v.* WALLIS.
Queen's Proctor's Suit.—Legitimacy.—Pleading 466

DYKE, QUEEN'S PROCTOR, *v.* WILLIAMS.
Queen's Proctor's Suit.—Legitimacy.—Pleading 465

DYKE, QUEEN'S PROCTOR, *v.* WILLIAMS.
Allegation of Bastardy.—Claim of Relationship.—Burden of Proof.—Admissibility of Evidence 491

EELES, THOMAS, in the Goods of.
Will.—Cutting.—Dependent relative Revocation.—Probate 600

FAIRWEATHER, THOMAS, in the Goods of.
Section 73 of Probate Act.—Creditor.—Secretary of an Association 588

FARADAY, BETTY, in the Goods of.
Wife.—Protection Order.—Registration.—20 & 21 Vict. c. 85, s. 21 369

FELL, WILLIAM W., in the Goods of.
Administration.—Intermeddling with Estate through Mistake.—Practice 126

FOREST, JANE, in the Goods of.
Will.—Subscription.—Motion to omit Name in Probate . 334

GAUSDEN, JOHN, in the Goods of.
Will.—Paper passed on Parchment.—Signature at foot or end.—Probate by consent 362

GODFREY, ELIZABETH, in the Goods of.
Mortgage of an Interest under Will.—Administration to Mortgagee 133

GOODBURN *v.* BAINBRIDGE AND OTHERS.
Citation.—Indorsement f Certificate of Service.—Practice 4

Page

GODENOUGH, JOSEPH, in the Goods of.
Wills.—Revocation and Destruction of earlier one.—Reference to by subsequent Codicil 141

GORDON, COLONEL, in the Goods of.
Conformation and Probate Act, 21 & 22 Vict. c. 56, s. 12.—Effect of an Eik, or additional Confirmation, limited to Personal Estate in England 622

GRIMWOOD *v.* COZENS AND OTHERS.
Codicil dependent on Will.—Effect of Destruction of Will.—Intention of Testator.—*Onus probandi* 364

HARGREAVES AND OTHERS *v.* WOOD AND OTHERS.
Executors.—Issues tried before Judge of Assize.—Compromise.—Rule of *Nisi Prius*.—Probate 602

HARRIS AND ANOTHER *v.* BRADBURY AND HALLADAY.
Attachment.—Married Woman condemned in Costs.—No separate Property 459

HAWARDEN *v.* DUNLOP.
Citation on alleged Executor to prové Will.—Motion to stay Proceedings.—*Lis alibi pendens*.—Motion to raise Question of Domicil.—Practice 150

HAWARDEN *v.* DUNLOP.
Issues joined in Probate Suit.—Effect of Scotch Confirmation of Executor, 21 & 22 Vict. c. 56 340

HAWARDEN, THE VISCOUNTESS, *v.* DUNLOP.
Will.—Compromise.—Failure to carry out Terms.—Bill in Chancery.—Limited Grant to substantiate Proceedings in Chancery 614

HINGESTON *v.* TUCKER AND HER MAJESTY'S PROCTOR (intervening).
Will.—Queen's Proctor.—Alleged next of Kin opposing.—Interest.—Practice.—Costs 596

HER MAJESTY'S PROCURATOR-GENERAL *v.* SAMUEL WILLIAMS.
Interest Suit.—Receiver in Suit in Chancery in respect of same Estates appointed Administrator *pendente lite* . . 353

ISHERWOOD *v.* CHEETHAM.
Domicil.—Will.—Declaration.—Demurrer 607

JOHNSON *v.* WELDY.
Practice.—Affidavit of Service on a Minor.—Guardian . . 313

Page

JOHNSON, GEORGE, in the Goods of.
Administration.—Renunciation of Next-of-kin solely entitled 595

JONES, JAMES, in the Goods of.
Will.—Trustee for Specific Purpose.—Executor according to the tenor 155

KING, WILLIAM, in the Goods of.
Affidavits.—Interlineation.—Description of Widow.—Rule 58, non-contentious Business 621

LAINSON *v.* NAYLOR.
Service of Citation.—Minor.—Practice 7

LANEUVILLE *v.* ANDERSON AND GUICHARD (intervening).
Wills.—French Docimil.—Executorship according to French Law.—Law of Country of Domicil.—Costs 24

LEESE, MATTHEW, in the Goods of.
Two Testamentary Papers.—Appointment of Executors in each.—No Revocation 442

LEWIS *v.* LEWIS.
Will.—Subscribed Witness.—Execution 153

LORIMER, CHARLES, in the Goods of.
Executors, acting and non-acting.—Executor of Acting Executor.—20 & 21 Vict. c. 77, s. 79.—21 & 22 Vict. c. 95, s. 16 471

LOVEGROVE, LETITIA, in the Goods of.
Mutual Will.—Survivor.—Probate 453

M'CABE, PETER FRANCIS, in the Goods of.
Wills and Codicils.—Destruction of later Will.—Reference to and Confirmation of Testamentary Paper by duly executed Letter 474

MORRIS, LOUISA, in the Goods of.
Administration.—Guardian elected by Minors.—Testamentary Guardian.—Practice 360

MORRISON, ROBERT, in the Goods of.
Administration *de bonis non*.—Residuary Legatee for Life and Substituted.—Practice 129

Page

MUNDY, EDWARD MILLER, in the Goods of.
Informal Codicil.—Doubt as to Dispositive Effect.—Title to Probate 119

NODDINGS, ROBERT, in the Goods of.
Will.—Executor.—Surviving Executor cited and not appearing.—20 & 21 Vict. c. 77, s. 79.—21 & 22 Vict. c. 95, s. 16 15

NORRIS *v.* ALLEN.
Probate in Solemn Form.—Directions for Trial.—County Court.—Probate Act, 1857, s. 59.—Probate Act, 1858, s. 10 601

O'BRIEN, JOHN, in the Goods of.
Domiciled Resident in British Guiana.—Local Law.—Administration to Attorney of Administrator-General of Guiana 604

OWSTON, FRANCIS, in the Goods of.
Deaf and Dumb Testator.—Will.—Instructions given by Signs.—Requisites of Affidavit 461

ONSLOW *v.* ALLARDICE AND CANNON.
Execution of Will by Law of Scotland.—Practice.—Costs . 136

PARKER, JOHN, in the Goods of.
Seaman's Will.—Informal Testamentary Paper.—1 Vict. c. 26, s. 11 375

PECK, CHARLES WILLIAM, in the Goods of.
Administration on Presumption of Death.—Immediate Grant.—Sect. 73 of Probate Act 506

PILE, ALEXANDER, in the Goods of.
Administration, with Will and Codicil annexed.—Construction.—Residuary Estate.—Tenancy in Common.—Lapse to undisposed Residue 628

POTTS, JOHN MORNEY, in the Goods of.
Letters of Administration in England.—Certificate for Irish Court of Probate.—Security.—Practice 5

RATCLIFF AND ANOTHER *v.* BARNES.
Verdict of Jury.—Caveat.—Probate.—Costs 486

ROBERTS *v.* ROBERTS.
Will.—Conditional.—Evidence of Adherence 337

Page

ROGERS AND ANDREWS *v.* GOODENOUGH AND ROGERS, ROGERS AND ROGERS intervening.
Will.—Codicil.—Revival.—Revocation.—Costs 342

ROSBOTHAM *v.* ROSBOTHAM.
Suit for Revocation of Probate.—Declaration.—Pleading.—Practice 121

RYDER, ANN HILL, in the Goods of.
Will.—Direction to nominate Executor.—Self-Appointment 127

SAWTELL, JAMAS WHITE, in the Goods of.
Appointment of Executor.—Misdescription.—20 & 21 Vict. c. 77, s. 73 448

SKIPPER AND OTHERS *v.* BODKIN AND OTHERS.
Special Jury.—Judge's Certificate for Costs.—Time for Application 1

SMETHURST *v.* TOMLIN AND BANKES.
Will.—Executor.—Conviction of Felony.—Title to Probate 143

SMITH, GEORGE AUGUSTUS FREDERICK, in the Goods of.
Administrator *de bonis non.*—Doubt as to Correctness of Original Grant 371

SMITH, WILLIAM GEORGE, in the Goods of.
Administration on Presumption of Death.—Immediate Grant.—Sect. 73 of Probate Act 508

STACPOOLE, HUGH, in the Goods of.
Administration Bond.—Amount of Penalty.—20 & 21 Vict. c. 77, s. 82 316

STAINES *v.* STEWART AND JONES.
Revocation of Will.—Evidence of Declarations of Deceased after alleged Act of Revocation.—Death of Plaintiff after Cause heard, and before Judgment.—Practice 320

STODDART, ALEXANDER, in the Goods of.
Scotch Marriage Contract or Settlement.—Quasi Testamentary Indorsement 356

THOMAS *v.* CROWTHER.
Will.—Issues in County Court.—Jurisdiction as to Costs.—Motion for Attachment.—Practice 501

Page

THORNCROFT AND CLARK *v.* LASHMAR.
Testamentary Papers.—Paper on the face of it not Testamentary.—Burden of Proof.—Costs 479

TROTT AND TROTT *v.* SKIDMORE AND OTHERS.
Will.—Position of Testator's Signature.—Death of Subscribed Witnesses 12

TUCKER, THOMAS, in the Goods of.
Claim of Executorship.—Diocesan Grants.—Bank of England.—20 & 21 Vict. c. 77, ss. 86, 87 123

TURRELL, AUGUSTUS, in the Goods of.
Double Probate.—Refusal to Produce Probate and Account of Estate.—Citation against Executor 456

WALKER, JOHN, in the Goods of.
Will.—Attestation Clause.—Signature of Deceased . . . 354

WEIR, MARY, in the Goods of.
Protection Order for Wife's Earnings.—Minor Children.—Guardian.—Administration 451

WELLS *v.* WELLS.
Plea.—Demurrer.—Practice 607

WINGATE, ANDREW, in the Goods of.
Confirmation and Probate Act (1858), 21 & 22 Vict. c. 56, ss. 9, 12.—Eik, or Additional Confirmation.—Seal of Court 625

WINN, JOHN MOSS, in the Goods of.
Will.—Condition Precedent.—Evidence 147

WHISTON, CHARLES, in the Goods of.
Administration.—Practice.—Isle of Man Grant 318

WHITE, SARAH, in the Goods of.
Administration.—Parties entitled Resident in State of Georgia.—Property not Perishable.—Sect. 73 of Probate Act 457

WHITE *v.* WHITE AND CATO.
Pleading.—Undue Influence.—Fraud.—Practice 504

WYATT, MATTHEW COLES, in the Goods of.
Will.—Codicil.—Mistaken Reference in Codicil.—Revival of Prior Will.—Alterations 494

IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Page

AFFORD *v.* AFFORD.
Wife suing *in formâ pauperis* allowed Costs 387

ALEXANDER *v.* ALEXANDER.
Decree for Restitution of Conjugal Rights.—Attachment for Disobedience.—Practice 385

ALEXANDER *v.* ALEXANDER AND AMOS.
Petition for Dissolution.—Adjournment of Hearing.—Leave for Wife to appear.—Practice on rehearing 96

ALLEN *v.* ALLEN AND D'ARCY.
Wife's Costs.—Suit for Dissolution by Husband.—Various Issues and Verdicts thereon.—Principles of Taxation . . 107

ANON.
23 & 24 Vict. c. 144, s. 7.—Intervention of Queen's Proctor.—Practice 249

ASHLEY *v.* ASHLEY.
Withdrawing Petition for Judicial Separation by Wife, and Filing one for Dissolution of Marriage.—Wife's Costs . 388

BACON *v.* BACON AND BACON.
Petition for Dissolution.—Adultery not traversed but other Pleas and Issues joined.—Right to begin.—Right to cross-examine 53
Decree of Dissolution.—Settlement of Wife's Property.—Costs 86

BAILEY *v.* BAILEY AND DELLA ROCCA.
Commission for Examination of Witnesses Abroad.—Wife's Costs 112

BAWDEN *v.* BAWDEN.
Petition for Dissolution.—Wife Respondent, Lunatic . . 417

BEAVAN (by his Guardian) *v.* BEAVAN.
Petition by Infant.—Costs.—Alimony *pendente lite*.—Wilful Neglect or Misconduct.—20 & 21 Vict. c. 85, s. 31 . . 652

BENT *v.* BENT AND FOOTMAN.
Dissolution of Marriage.—Damages.—Provision for Adultress.—Custody of Children 392

Page

BEVAN (falsely called M'MAHON) *v.* M'MAHON.
False Statement in Affidavit to lead Marriage Licence.—Suit for Nullity not sustained 230

BEVAN *v.* M'MAHON AND BEVAN (falsely called M'Mahon).
Evidence on Commission.—Reopening Commission to enable a Witness to supply Omissions in his Evidence.—Discretion of Court 55

Petition for Decree of Nullity.—Death of Petitioner.—Interest to commence or continue Suit 58

BOND *v.* BOND.
Petition by Wife for Dissolution.—Domicil of Husband.—Jurisdiction 93

BOULTON *v.* BOULTON AND PAGE.
Decree *Nisi* for Dissolution of Marriage.—Affidavit of Respondent disclosing material Matter.—Practice 405

BOULTON *v.* BOULTON AND PAGE, and the Queen's Proctor intervening.
Decree *Nisi*.—Intervention of Queen's Proctor.—Pleading.—Mode of Trial.—23 & 24 Vict. c. 144, s. 7.—Rules of 22nd of November, 1860 551

Husband's Petition for Dissolution.—Decree *Nisi*.—Queen's Proctor's Intervention.—Reversal.—Costs 638

BOUVERIE, JOHN AUGUSTUS SHIEL, *Re* the Petition of.
Legitimacy Declaration Act, 21 & 22 Vict. c. 93.—Mode of Trial 548

BOYNTON *v.* BOYNTON (before the FULL COURT).
Dissolution of Marriage.—Custody of Child.—Application of Money under Settlement.—20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, ss. 4, 5.—Costs 275

BROCAS *v.* BROCAS.
Petition for Dissolution.—Abatement by Death of Parties.—Practice 383

BRODIE *v.* BRODIE (before the JUDGE ORDINARY, and, subsequently, before the FULL COURT).
Petition for Dissolution.—Domicil.—Jurisdiction.—Practice 259

BURROUGHS *v.* BURROUGHS.
Wife's Suit for Restitution.—Plea, reasonable Suspicion of Adultery.—Demurrer allowed 303

Page

BURROUGHS *v.* BURROUGHS.
Wife's Petition for Restitution.—Husband's Answer alleging Adultery.—Right to begin.—Competent Witnesses . 544

BURT *v.* BURT.
Bigamy and Adultery.—Proof of second Marriage . . . 88

BUSBY *v.* BUSBY AND VINE.
Attachment for Non-Payment of Costs.—Affidavit of Service of Order 383

CARTLIDGE *v.* CARTLIDGE.
Custody of Infant pending Suit.—Right of Father.—20 & 21 Vict. c. 85, s. 35 567

CASE *v.* CASE.
Petition for Dissolution.—Desertion.—Evidence of Contents of Letters without Notice to produce.—Practice . 65

CLARK *v.* CLARK AND BOUCK.
Dissolution of Marriage.—Damages.—20 & 21 Vict. c. 85, s. 33 520

CLOUT *v.* CLOUT AND HOLLEBONE.
Dissolution of Marriage on the Ground of Wife's Adultery.—Access to Children 391

COOKE *v.* COOKE AND QUAILE.
Practice.—Return of Citation when Personal Service has been dispensed with.—Commissioner to examine, Respondents not having appeared, appointed by Court 50

COX *v.* COX.
Decree *Nisi* for Dissolution.—Cause shown by Attorney-General.—Conduct of Suit.—Practice 306

DAVIES *v.* DAVIES AND DALBY.
Non-payment of Costs.—Attachment.—Service of Office Copy of Order.—Practice 437

DECK *v.* DECK.
Petition by Wife for Dissolution.—Domicil of Husband at date of Service of Citation.—Jurisdiction 91

DEMPSTER *v.* DEMPSTER.
Wife's Petition for Dissolution.—Cruelty and Adultery.—Condonation 438

DICKENS *v.* DICKENS.
Alimony and Costs.—Attachment.—20 & 21 Vict. c. 85, s. 52. 521

Page

DICKENS *v.* DICKENS.
Wife's Petition.—Taxed Costs during Suit.—Practice . . 103
Order to pay Alimony.—Attachment.—Discharge in Bankruptcy.—Sequestration.—24 & 25 Vict. c. 184 645

DOLBY *v.* DOLBY AND HEWITT.
Petition for Dissolution.—Issue between Petitioner and Co-Respondent found against the latter.—Unsatisfactory Evidence.—No Decree against Wife 228

DRUMMOND (commonly called VISCOUNTESS FORTH) *v.* DRUMMOND (commonly called VISCOUNT FORTH), and the Queen's Proctor intervening.
Wife's Petition for Dissolution.—Intervention of Queen's Proctor.—Adultery proved against Petitioner.—23 & 24 Vict. c. 144. s. 7 269

FISHER *v.* FISHER.
Decree for Dissolution at Suit of Wife.—Maintenance.—20 & 21 Vict. c. 85, s. 32. 410

FLETCHER *v.* FLETCHER.
Alimony *pendente lite*.—Husband on Leave of Absence from Bengal for Six Months without Pay 434

FORSTER *v.* FORSTER AND THOMAS.
Alimony.—Policy of Insurance 553

FURNESS *v.* FURNESS.
Bigamy and Adultery.—Condonation.—Revival 63

GETHIN *v.* GETHIN, and the Queen's Proctor intervening.
Petition for Dissolution at Suit of Wife.—No Answer.—Petition part heard.—Intervention of Queen's Proctor.—Practice 406
Verdict of Jury.—Motion for New Trial.—Affidavits.—Practice 560

GOODE *v.* GOODE AND HAMSON.
Petition for Dissolution by Husband.—Adultery pleaded.—Condonation replied 253

GOODHEIM *v.* GOODHEIM AND FRANKINSON.
Petition for Alimony *pendente lite*.—Wife in actual Possession of Income 250

Page

GRANT (now deceased) *v.* GRANT AND BOWLES AND PATTISON.
Decree *Nisi*.—Death of Petitioner.—Abatement of Suit.—Children.—Settlement 522

GRAY *v.* GRAY, and the Queen's Proctor intervening.
Decree *Nisi*.—Queen's Proctor's Intervention.—Collusion.—Evidence 554

GRAY *v.* GRAY, and the Queen's Proctor intervening (before the JUDGE ORDINARY).
Petition for Dissolution of Marriage and Decree *Nisi*.—Intervention of Queen's Proctor.—Motion to take Petition off the File.—23 & 24 Vict. c. 144, s. 7 263

GRAY *v.* GRAY, and the Queen's Proctor intervening (on Appeal, before the FULL COURT).
Decree *Nisi* for Dissolution.—Intervention of Queen's Proctor.—Motion on behalf of Petitioner to take Petition off the File.—23 & 24 Vict. c. 144, s. 7 266

HARDING v. HARDING AND LANCE.
Taxation of Wife's Costs.—Practice 549

HEPWORTH *v.* HEPWORTH.
Wife's Petition for Dissolution.—Order on Husband to pay Money into Court to meet her Costs of Hearing.—Attachment.—Practice 414
Practice.—Postponing Trial.—Notice of Motion 514

HILL *v.* HILL.
Appeal from Decision of Judge Ordinary refusing Rule *Nisi* for New Trial 407

HILL *v.* HILL AND WOOD.
Practice.—Dismissing Petition after Verdict.—Rule 45 . . 515

HITCHCOCK *v.* HITCHCOCK.
Practice.—Dismissing Petition after Verdict.—Rule 45 . . 513

HOOD *v.* HOOD.
Wife's Costs on Commission to examine Witnesses, 113 *in notis*.

HORNE *v.* HORNE.
Petition for Dissolution.—Bigamy coupled with Adultery . 48

HUNT *v.* HUNT AND DUKE.
Answer of Co-Respondent.—Pleading.—Practice 574

Page

JESSOP *v.* JESSOP.
Petition for Dissolution at Suit of Wife.—Negative Answer of Husband.—Intervention of Queen's Proctor.—Plea of Collusion.—Practice 301

JEWELL *v.* JEWELL.
Petition on Ground of Cruelty.—Pleading.—Practice . . 573

LATHAM *v.* LATHAM AND GETHIN.
Decree *Nisi* for Dissolution.—Effect of, as between the Parties.—Alimony *pendente lite*, to what period due . . 298

LATOUR *v.* LATOUR AND WESTON, and the Queen's Proctor intervening.
Decree Nisi.—Intervention of Queen's Proctor.—Adultery of Petitioner.—20 & 21 Vict. c. 85, s. 31 524

LAWRENCE *v.* LAWRENCE.
Petition for Dissolution.—Desertion.—Conduct of Husband.—Letters of Husband 575

LEETE *v.* LEETE.
Wife's Petition on Ground of Cruelty.—Demurrer.—Motion to set aside.—Pleading.—Practice 568

LEWIS *v.* LEWIS.
Decree *Nisi* for Dissolution.—Subsequent Cohabitation.—Stay of Proceedings 394

MARCH *v.* MARCH.
Petition for Dissolution.—Conviction of Bigamy.—Proof by Affidavit 49

MARRIS *v.* MARRIS AND BURKE, and the Queen's Proctor intervening.
Petition for Dissolution.—Intervention and Pleas of Queen's Proctor.—Connivance 530

MILLER *v.* MILLER AND HICKS.
Rule *Nisi* for New Trial.—Principles of granting . . . 427

MILLS *v.* MILLS.

MUNT *v.* MUNT.
Sequestration.—Amount due under Award.—Payment into Court.—Attorney's Lien 661

NICHOLLS *v.* NICHOLLS.
Order for Payment of Taxed Costs.—Personal Service.—Practice 637

Page

PALMER *v.* PALMER.
Wife's Petition for Dissolution.—Cruelty condoned.—Revived by subsequent Adultery 61

PEARSON *v.* PEARSON.
Order for Payment of Costs.—No Indorsement of Amount on Writ.—Practice 546

POLLACK *v.* POLLACK AND DEANE AND M'NAMARA.
Evidence of Witnesses resident abroad taken under Commission.—Proof of Absence from Jurisdiction.—Practice 310

POUNSFORD *v.* POUNSFORD AND BULPIN.
Dissolution of Marriage.—Damages.—Immediate Execution.—Order to pay Damages into Court 389

QUICKE *v.* QUICKE.
Petition for Dissolution.—Motion to proceed without Co-Respondent refused 419

RYDER *v.* RYDER (on Appeal from Interim Order as to Custody of Children).
Custody of Children.—35th sec. of Divorce Act.—Age.—Practice on Motion for Interim Order 225

SEDDON *v.* SEDDON AND DOYLE.
Petition for Dissolution.—Petitioner's Adultery.—Dismissal of Parties.—Custody of Children.—Costs 640

SERRELL *v.* SERRELL AND BAMFORD.
Husband's Petition for Dissolution.—Answer alleging Husband's Impotency.—Practice.—Evidence 422
Decree *Nisi*.—Affidavit of Search within Three Calendar Months.—Practice 636

SHAW *v.* SHAW.
Wife's Petition on Ground of Cruelty.—Husband's Answer.—Justification for using Force.—Pleading . . . 515
Delivery or Inspection of Papers.—Commission to examine Witnesses.—Practice 642
Intimidation of Witnesses.—Contempt of Court 517

SHEDDEN AND SHEDDEN *v.* HER MAJESTY'S ATTORNEY-GENERAL AND PATRICK *v.* PATRICK.
Petition for Declaration of Legitimacy and *Status* of British-born Subject.—21 & 22 Vict. c. 93.—Parties to such a Petition.—Plea of *res judicata*.—Declarations in Questions of Legitimacy.—Berkeley Peerage Case 170

Page

SIMONIN (falsely called MALLAC) *v.* MALLAC.
Petition for Nullity of Marriage.—Jurisdiction.—*Lex domicilii.*—*Lex loci contractus* 67

SMALLWOOD *v.* SMALLWOOD.
Judicial Separation.—Cruelty.—Personal Violence . . . 397

SOPWITH *v.* SOPWITH.
Wife's Petition Dismissed.—Practice on Taxation of Wife's Costs 106
Petition for Restitution.—Answer alleging Petitioner's Adultery.—Reply of Estoppel.—Demurrer 160

STOATE *v.* STOATE.
Suit for Separation.—Verdict and Decree thereon.—Such Decree inadmissible as Evidence in a subsequent Suit for Dissolution 223
Decree *Nisi* for Dissolution.—Right of Respondent under 23 & 24 Vict. c. 144, s. 7 384

SYMONS *v.* SYMONS AND PIKE.
Notice of Abandonment of Petition by Petitioner.—Dismissal of Petition on Motion of Respondent and Co-Respondent.—Costs.—Practice 435

THOMAS *v.* THOMAS.
Costs.—Service of Order and Demand.—Attachment . . 64

THOMAS *v.* THOMAS.
Marriage Settlement.—No Issue of Marriage.—22 & 23 Vict. c. 61, s. 5 89

THOMAS *v.* THOMAS.
Petition for Judicial Separation.—Deed to live Separate.—Connivance and Consent 113

THOMPSON *v.* THOMPSON AND BARRAS.
Dissolution of Marriage.—Settlement.—22 & 23 Vict. c. 61, s. 5 652

THOMPSON *v.* THOMPSON AND STURMFELLS.
Access to Children.—Jurisdiction of the Court.—20 & 21 Vict. c. 85, s. 35.—Appeal 402

TURNER *v.* TURNER.
Judicial Separation.—Two Petitions filed.—Two Citations issued.—Appearance.—Practice 426

Page

W— *v.* H— (falsely called W—).
Petition for Nullity by reason of Malformation.—Report of Inspectors.—Evidence 240

WADDELL *v.* WADDELL.
Wife's Petition.—Adultery.—Cruelty 584

WHIELDON *v.* WHIELDON.
Permanent Alimony.—Children in Wife's Custody . . . 388

WING *v.* TAYLOR (falsely calling herself WING).
Suit for Nullity.—Intercourse before Marriage with Wife's Mother 278

WINSTONE *v.* WINSTONE AND DYNE.
Petition for Dissolution of Marriage.—Petition for permanent Alimony after Decree *Nisi* for Dissolution . . . 246

WOODGATE (Committee of TAYLOR) *v.* TAYLOR.
Judicial Separation.—Suit by Committee of Lunatic . . . 512

ZYCKLINSKI *v.* ZYCKLINSKI.
Petition for Dissolution.—Plea to the Jurisdiction.—Practice 420

APPENDIX.

IN THE CONSISTORIAL COURT OF DUBLIN, AND IN THE COURT OF DELEGATES IN IRELAND.

SEAVER *v.* SEAVER.
Restitution of Conjugal Rights.—Adultery.—Mutual Guilt.—*Compensatio Criminis.*—Replication 665

TABLE OF CASES

REFERRED TO IN THE JUDGMENTS.

IN THE COURT OF PROBATE.

Page

Allen *v.* M'Pherson (1 H. of L. 191) 592

Baynes *v.* Harrison (Deane, 15) 133
Boddicott and Hamilton *v.* Dalzeel (2 Lee, 294) 156
Brenchley *v.* Lynn (2 Rob. 469) 136

Clarke, Susanna, in the Goods of (1 Swab. & Trist. 22) 594
Coventry *v.* Williams (3 Curt. 787) 484

De Bode, in the Goods of (5 N. C. 188) 601
De Bonneval *v.* De Bonneval (1 Curt. 856) 43
De Bonneval *v.* De Bonneval (1 Curt. 856) 153
Doe dem. Cross *v.* Cross (8 Q. B. 714) 484
Doe d. Williams *v.* Evans (1 Cr. & Mee. 42) 11
Doe dem Shallcross *v.* Palmer (16 Q. B. 747) 329
Dormoy Ann, in the Goods of (3 Hagg. 767) 45
Dumsday *v.* Hughes (3 B. & P. 453) 471

Freckleton, George, in the Goods of (1 Swab. & Trist. 16) 125

Gordon, Col. John, in the Goods of (2 Swab. & Trist. 622) 628
Griffin and Amos *v.* Ferrard (1 Curt. 96) 484

Hale *v.* Tokelove (2 Rob. 318) 350, 352
Hare *v.* Nasmith (2 Add. 25) 43
Harrison *v.* Elwin (3 Q. B. 117) 154
Haynes *v.* Hill (7 N. C. 265) 11

Kipping *v.* Ash (4 N. C. 177, and 1 Robert. 270) 22

Page

Mayo *v.* Brown (2 Lee, 391) 470
Milligan, in the Goods of (2 Robert. 108) 377
Munday, in the Goods of (2 Swab. & Trist. 119)..... 484

Newton *v.* Newton (2 L. T. Rep. p. 218, 1861) 350, 352
Newton and Wife *v.* Boodle (4 Com. B. 359) 379

Parsons *v.* Lanoe (1 Ves. sen. 189) 339
Passmore *v.* Passmore (1 Phil. 216) 484
Phelps, Stephen Francis, in the Goods of (6 N. C. 695) 11
Playne *v.* Scriven (7 N. C. 122) 315
Price *v.* Dewhirst (4 Myl. & Cr. 82) 43

Queen's Proctor *v.* Thorn and Walker (not reported) 469

Waggett *v.* Shaw (3 Camp. 316)..... 3

IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Addison's, Mrs., Case (Macqueen's Practice of the House of Lords, 477, 594) 298
Anichini *v.* Anichini (2 Curt. 210) 256

Barker v. Barker (2 Add. 285) 117
Beeby *v.* Beeby (1 Hagg. 789) 256
Berkeley Peerage Case (4 Camp. N. P.) 187
Bramwell *v.* Bramwell (3 Hagg. 618, 629) 167, 439
Briggs *v.* Morgan (2 Consist. Rep. 328)..... 244
Bright *v.* Eynon (1 Burr. 390; 2 Kenyon's Notes, 53) 490
Brown *v.* Brown (1 Hagg. 524) 243

Compton *v.* Bearcroft (2 Consist. Rep. 444 *note*) 82

D. *v.* A. (1 Rob. 279, 298) 244
D'Aguilar *v.* D'Aguilar (1 Hagg. 733) 167
Dalrymple *v.* Dalrymple (2 Consist. Rep. 61) 75
Deck *v.* Deck (2 Swab. & Trist. 91) 95
Dormer *v.* Williams (1 Curt. 70) 239
Duke of Newcastle *v.* Hundred of Broxtowe (4 B & Ad. 280) 188

Page

Durant *v.* Durant (1 Hagg. 733) 167, 440

Forster *v.* Forster (1 Consist. Rep. 144) 165
Freeman *v.* Philips (4 M. & S. 486) 188

Gordon *v.* Pye (Fergusson's Consist. Rep. 361) 82
Hill *v.* Good (Vaughan, 325) 295
Hook *v.* Hook (1 Swab. & Trist. 183) 420

Lockwood *v.* Lockwood (2 Curt. 281) 401

Marsh *v.* Marsh (1 Swab. & Trist. 312) 277
Middleton *v.* Janverin (2 Consist. Rep. 437) 80
Molony *v.* Molony (2 Add. 249) 167
Moore *v.* Moore (3 Moo. P. C. 84) 168

Reilly *v.* Fitzgerald 187
Ray *v.* Sherwood and Ray (1 Curt. 173, 193; 1 Moo. P. C. 402)... 60
R. *v.* Boston (4 East. 572) 224

Saunders *v.* Saunders (1 Robert. 549, 562) 401, 586
Scrimshire *v.* Scrimshire (2 Consist. Rep. 395) 78
Smith *v.* Smith (2 Phil. 212) 401
Stones *v.* Corke (7 Sim. 22, and 8 Sim. 321, in note) 647

Turton *v.* Turton (3 Hagg. Eccl. 351) 439

Walker *v.* Walker (1 Curt. 564) 416
Westmeath *v.* Westmeath (2 Hagg. Suppl. 52) 587

APPENDIX.

22 & 23 Vict. c. 61.

An Act to make further Provision concerning the Court for Divorce and Matrimonial Causes.

[13*th August*, 1859.]

Whereas it is expedient to make further Provision concerning "The Court for Divorce and Matrimonial Causes," established by the Act of the Session holden in the twentieth and twenty-first years of her Majesty, chapter 85: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: 20 & 21 Vict. c. 85.

I. In addition to the Judges mentioned in section 8 of the said Act, all the Judges for the time being of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively, not already made Judges of the Court for Divorce and Matrimonial Causes, shall be Judges of such Court. Judges of the Queen's Bench, etc., to be Judges of the Court for Divorce.

II. The Judge Ordinary of the said Court, and eight or more of the other Judges thereof, shall, from time to time, by general orders for this purpose, appoint so many sittings of the full Court in every year, and at such times as may appear to them necessary or convenient for disposing of the matters arising in the said Court which may not be heard and determined by the Judge Ordinary alone; and the Judges of the said Court shall, by a rota or otherwise as they may deem most convenient, make provision for the attendance of the requisite number of Judges to make a full Court at the times so appointed for the sittings of the full Court. Judge Ordinary and eight of the other Judges to appoint the sittings of the full Court.

III. The Judge Ordinary shall have place and precedence in the said Court next after the Lord Chief Baron of Her Majesty's Court of Exchequer. Precedence of the Judge Ordinary.

The Court may make Orders as to custody of children after a final Decree of Separation.

IV. The Court after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provision with respect to the custody, maintenance, and education of the children the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary alone or with one or more of the other Judges of the Court.

20 & 21 Vict. c. 85.

As to marriage settlements of parties after final Decree of Nullity of Marriage.

V. The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit.

On a petition by wife on account of adultery, etc., both husband and wife competent, etc., to give evidence.

VI. On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery, coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Extension of right of appeal to the House of Lords.

VII. The right of appeal to the House of Lords given by the fifty-sixth section of the recited Act shall extend to all sentences and final judgments on petitions under the Legitimacy Declaration Act, 1858.

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23 & 24 VICT. c. 144.

An Act to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes.

[28*th August*, 1860.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The Judge Or-

I. It shall be lawful for the Judge Ordinary of the Court for Di-

vorce and Matrimonial Causes alone to hear and determine all matters arising in the said court, and to exercise all powers and authority whatever which may now be heard and determined and exercised respectively by the full Court or by three or more Judges of the said court, the Judge Ordinary being one, or where the Judge Ordinary shall deem it expedient, in relation to any matter which he might hear and determine alone by virtue of this Act, to have the assistance of one other Judge of the said court, it shall be lawful for the Judge Ordinary to sit and act with such one other Judge accordingly, and, in conjunction with such other Judge, to exercise all the jurisdiction, powers, and authority of the said court.

dinary may exercise powers now vested in the full Court.

Judge Ordinary may call in the assistance of one of the other Judges.

II. Provided always, that the Judge Ordinary may, where he shall deem it expedient, direct that any such matter as aforesaid shall be heard and determined by the full Court; and in addition to the cases in which an appeal to the full Court now lies from the decision of the Judge Ordinary, either party dissatisfied with the decision of such Judge sitting alone in granting or refusing any application for a new trial which by virtue of this Act he is empowered to hear and determine may, within fourteen days after the pronouncing thereof, appeal to the full Court, whose decision shall be final.

Judge may direct any matter to be heard by the full Court.

Appeal to the full Court.

III. Where there is a right of appeal to the House of Lords from the decision of the full Court there shall be the like right of appeal to the said House from the decision of the Judge Ordinary alone, or with any other Judge, under this Act.

Appeal to the House of Lords.

IV. The sittings of the full Court shall be holden during the seventh and five following days of sitting in each term, and on such other days as the Judge Ordinary, with the assent of the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, shall from time to time appoint; and the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer shall, by a rota or otherwise, as they deem most convenient, make provision for the attendance of the requisite number of such judges to make with the Judge Ordinary a full Court during such sittings; and section 2 of the Act of the last Session of Parliament, chapter 61, shall be repealed.

Regulation of the sittings of the full Court.

22 & 23 Vict. c. 61, s. 2, repealed.

V. In every case of a petition for a dissolution of marriage it shall be lawful for the Court, if it shall see fit, to direct all necessary papers in the matter to be sent to Her Majesty's Proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matter, and which the Court may deem it necessary or expedient to have fully

Court may, where one party only appears, require Counsel to be appointed to argue on the other side.

argued; and Her Majesty's Proctor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

20 & 21 Vict. c. 85, s. 45, amended.

VI. And whereas by section 45 of the Act of the Session holden in the twentieth and twenty-first years of Her Majesty, chapter 85, it was enacted, that "In any case in which the Court should pronounce "a sentence of divorce or judicial separation for adultery of the wife, "if it should be made appear to the Court that the wife was entitled "to any property, either in possession or reversion, it should be "lawful for the Court, if it should think proper, to order such "settlement as it should think reasonable to be made of such pro-"perty, or any part thereof, for the benefit of the innocent party "and of the children of the marriage, or either of them." Be it further enacted, That any instrument executed pursuant to any order of the Court made under the said enactment before or after the passing of this Act, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof.

Decrees.

VII. Every decree for a divorce shall, in the first instance, be a decree nisi, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the Court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court; and, on cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who

Collusion.

may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpœna witnesses to prove it; and it shall be lawful for the Court to order

the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and in case the said Proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.

VIII. This Act shall continue in force until the 31st day of July, 1862, and no longer. Continuance of Act.

Further Rules and Regulations for her Majesty's Court for Divorce and Matrimonial Causes, made under the Provisions of 20 & 21 *Vict. c.* 85, 21 & 22 *Vict. c.* 108, 22 & 23 *Vict. c.* 61, *and* 23 & 24 *Vict. c.* 144.

DISSOLUTION OF MARRIAGE.

Intervention pending Suit.

16. When the Queen's Proctor, by leave of the Court, intervenes, he shall, within eight days after such leave obtained, enter an appearance, and plead to the petition; and all subsequent pleadings shall proceed between the petitioner and the intervener according to the rules established with regard to pleadings between the original parties in the cause.

Showing Cause against a Decree.

17. Any person wishing to show cause against making absolute a decree nisi for dissolution of a marriage shall enter an appearance, and such appearance shall be accompanied by an address within three miles of the General Post Office, at which it shall be sufficient to serve all notices, and leave copies of instruments which are to be delivered to such person.

18. Every such person shall at the time of entering an appearance, or within four days thereafter, file affidavits setting forth the facts upon which he relies.

19. Upon the same day on which such person files his affidavits he shall deliver a copy of the same to the party in the cause in

whose favour a decree nisi for dissolution of marriage has been pronounced.

20. The party in the cause in whose favour the decree nisi for dissolution of marriage has been pronounced may, within eight days after delivery of the affidavits, or within such further time as may be allowed by the Court, file affidavits in answer, and shall forthwith give notice of his having done so.

21. The questions raised on such affidavits shall be argued at such time as the Judge Ordinary may appoint; and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue tried in this Court.

(Signed) CAMPBELL, C.
A. E. COCKBURN.
W. ERLE.
FRED. POLLOCK.
C. CRESSWELL.
WM. WIGHTMAN.
EDW. VAUGHAN WILLIAMS.
J. B. BYLES.
H. S. KEATING.

REPORTS OF CASES

DECIDED IN THE

COURT OF PROBATE

AND IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

SKIPPER AND SKIPPER *v.* BODKIN AND OTHERS.

1860.
March 28.

SKIPPER AND SKIPPER v. BODKIN AND OTHERS.

Special Jury.—Judge's Certificate for Costs.—Time for Application.—20 & 21 *Vict. c.* 77, *s.* 36.—6 *Geo. IV. c.* 50, *s.* 34.

An application for a certificate of the costs of a special jury ought to be made immediately after the verdict has been given. An application made on a subsequent day is too late.

This was an application for a certificate for the costs of a special jury in a cause of proving in solemn form of law the last will and testament of the late Rev. John William Smyth, of Cringleford, in the county of Norfolk, clerk, deceased.

The will was propounded by the plaintiffs, who were the executors named therein, and probate of it was opposed by the heir-at-law and the next of kin of the deceased, on the ground first, that at the time of its execution the testator had not testamentary capacity; and, secondly, that its execution was procured by the undue influence of the plaintiffs and others.

The plaintiffs, on moving for directions as to the mode of trial, applied for the cause to be tried before the judge himself

1860. March 28.

SKIPPER AND SKIPPER v. BODKIN AND OTHERS.

without a jury, when the defendants asked that it should be tried before the judge and a special jury.

The application of the defendants was granted, and the cause came on for hearing before the Judge of the Court of Probate and a special jury on the 6th, 8th, and 9th of December, 1859. At half-past five P.M. of the 9th of December the jury retired to consider their verdict, and returned about seven P.M., when they found by their verdict: first, that the testator at the time of the execution of the will propounded was of perfect sound mind, memory, and understanding; and, secondly, that the will was made and executed under undue influence. Upon the delivery of the verdict, in consequence of the absence of the defendants' counsel, no application was made on behalf of the defendants to the Judge to certify that the case was a proper one to be tried by a special jury. The plaintiffs subsequently obtained a rule *nisi* for a new trial, on the ground that the verdict of the jury on the second issue was against the evidence.

The defendants showed cause against the rule being made absolute before Sir C. Cresswell, assisted by Erle, C.J., and Williams, J., who, after hearing counsel on both sides, were of opinion that there ought to be a new trial.

Sir C. Cresswell thereupon, by an order of Court dated March 7, 1860, directed that the question of fact arising out of the pleadings in the cause should be tried anew upon payment of costs.

March 21. *Dr. Phillimore*, Q.C., moved the Judge to certify for the costs of the special jury.

Dr. Tristram, for the plaintiffs, was instructed not to oppose, but not to assent to the application. He left it in the hands of the Court.

SIR C. CRESSWELL: It was a very proper case to be tried

by a special jury. But I incline to think that, according to the authorities, the application ought to have been made immediately after the verdict, and that you are now too late. In *Waggett* v. *Shaw*, 3 Camp. 316, an application on the day after the trial was considered too late; and in *Grace* v. *Clinch*, 4 Q. B. 606, where the certificate was verbally granted immediately after the verdict, and indorsed on the record, but not signed by the Judge till the costs were undergoing taxation, it was held too late. If you can find any authority in favour of the application, I will grant it. Let the case stand over.

1860.
March 21.

SKIPPER AND SKIPPER v. BODKIN AND OTHERS.

Dr. Phillimore, Q.C., renewed the motion. He had been unable to find any authority in support of it. It would seem at first sight as if by s. 86 of the Probate Act (20 & 21 Vict. c. 77) the parties were remitted to 6 Geo. IV. c. 50, s. 34, but he submitted the powers of this Court were not so limited in respect of costs as that of the courts of common law. In many points on the question of costs the practice in the Prerogative Court was followed, although it was at variance with that of the courts of common law.

March 28.

SIR C. CRESSWELL: When there is a question of fact to be determined by a jury, I am, according to the latter part of the 36th section of the Probate Act, "to have the same jurisdiction, powers, and authority in all respects as belong to any superior court of common law." I think that by these words it is implied, that where the powers exercised by the Judges of the courts of common law are applicable, and a special or larger power is not conferred on me by the statute, I ought to exercise the same powers as are exercisable by the courts of common law.

Dr. Phillimore submitted that, although the Court might not feel itself at liberty to certify for costs, it might still direct the Registrar to allow the costs on taxation.

1860.
March 21.

SKIPPER AND SKIPPER v. BODKIN AND OTHERS.

SIR C. CRESSWELL: I am bound to follow the practice of the Prerogative Court where it is applicable and has not been altered by the Probate Act or the rules made under it. In the present case it is not applicable; and I think that I ought to follow the provisions of 6 Geo. IV. c. 50, in certifying for costs. The Legislature, by the 34th section of this Act, appears to have thought that it was necessary to confine the power of the Court in certifying for the costs of a special jury to a particular time, in order that it might determine whether it was a proper case for costs or not, when the facts were fresh in its mind and it was undisturbed by matters subsequent. I must reject the motion. *Motion rejected.*

Cherill, Proctor for the plaintiffs.
Ayrton and *Ibbetson*, Proctors for the defendants.

April 4.

GOODBURN v. BAINBRIDGE AND OTHERS.

GOODBURN v. BAINBRIDGE AND OTHERS.

Citation.—Indorsement of Certificate of Service.

When a citation has been served, a certificate of service should be indorsed on the citation.

This was an application for administration of the effects of the deceased to be granted to the plaintiff as a creditor. The parties entitled in distribution had been duly cited, but had not entered an appearance.

Dr. Wambey moved for letters of administration to be granted to the plaintiff.

SIR C. CRESSWELL: In this case the usual certificate of service of the citation has been omitted to be indorsed on the

citation. There is no rule requiring this to be done; but it is a very useful practice, particularly in uncontested cases. It will be better to observe this practice in future.

1860.
April 4.

GOODBURN
v.
BAINBRIDGE
AND OTHERS.

In the Goods of JOHN MORNEY POTTS (deceased), on Motion.

April 4.

Practice in respect of Certificates for the Irish Probate Court on Letters of Administration originally granted in England, and the security required to be given.—20 & 21 *Vict. c.* 79, *s.* 94.—22 & 23 *Vict. c.* 31, *s.* 25.

In the Goods of JOHN MORNEY POTTS.

In this case, J. M. Potts, of Old Oak Villa, Shepherd's Bush, in the county of Middlesex, died on the 23rd of February, 1860. He left a will in which no executor was appointed, but of which Elizabeth Rattey, spinster and a minor, was the residuary legatee; her mother renounced the guardianship, and the minor had elected William Mortimer as her curator or guardian; he took administration with the will annexed on the 20th of March, and swore the property under £2000 in England, and gave the usual bond in a penalty of double that amount. There was also property in Ireland under the value of £60,000.

By 20 & 21 Vict. c. 79 (Probates and Letters of Administration, Ireland), sect. 94, it is enacted that "From and after "the period at which this Act shall come into operation, when "any probate or letters of administration to be granted by "the Court of Probate in England shall be produced to and a "copy thereof deposited with the registrars of the Court of "Probate in Ireland, such probate or letters of administration "shall be sealed with the seal of the said last-mentioned court, "and being duly stamped, shall be of like force and effect, "and have the same operation in Ireland as if it had been "originally granted by the Court of Probate in Ireland."

1860. April 4.

In the Goods of JOHN MORNEY POTTS.

By the 22 & 23 Vict. c. 31, s. 25, it is enacted that "Letters of administration, granted by the Court of Probate "in England, shall not be resealed, under sect. 94 of 20 & 21 "Vict. c. 79, until a certificate has been filed under the hand "of a registrar of the Court of Probate in England, that a "bond has been given to the Judge of the Court of Probate "in England in a sum sufficient to cover the property in "Ireland as well as in England, in respect of which such "administration is required to be resealed."

In consequence of a difficulty felt in the registry as to the proper course to be adopted under these enactments in respect to the circumstances of the above case,

Dr. Middleton now moved the Court "to order that, upon an additional bond being given into the registry either for double the amount of the English and Irish property, or of the Irish property alone, as the Court might think fit, one of the registrars do issue a certificate pursuant to 22 & 23 Vict. c. 31, s. 25, and that a note of further security given be made upon the grant, but that the grant be not otherwise altered, and that no *ad valorem* fees be charged in respect of the amount of the Irish property." He submitted that an additional bond to cover the property in Ireland was admissible, in which case the *ad valorem* fees to be taken in the registry[1] would not, he apprehended, be due on the amount under which the Irish property was sworn. Such fees would certainly be due in Ireland, and the property ought not to have to pay them twice.

SIR C. CRESSWELL made no order in court, but subsequently

[1] See fees to be taken in the principal Registry of the Court of Probate in non-contentious business. Rules and fees of 1857. The Court disclaimed any power of interfering in respect of these fees, but it is apprehended that the effect of allowing a separate bond in respect of the Irish property would be that the fees would be payable in Ireland only.

a minute to the following effect was taken down by the registrar:— 1860. April 4.

In the Goods of JOHN MORNEY POTTS.

Ordered, that on a bond being given by the said W. Mortimer with his sureties in the penal sum of £120,000 for the faithful administration of the personal estate and effects of the said John Morney Potts, deceased, it be noted on the letters of administration already granted to the said William Mortimer, that the personal estate in Ireland of the said deceased had since been sworn under £60,000, and security given accordingly, and that a certificate do issue under the hand of one of the registrars of the registry of the Court that a bond has been given to the judge of the Court of Probate in England, in a sum sufficient in amount to cover the property in Ireland as well as in England.

LAINSON *v.* NAYLOR.

May 2.

LAINSON *v.* NAYLOR.

Service of citation.—Minor.—Practice.

Where a minor of the age of seventeen was living in service at a distance from her mother, her natural guardian, the Court dispensed with the ordinary rule, which requires service of a citation upon a minor to be effected upon her in the presence of her natural or legal guardian, or of some person upon whom her custody for the time being properly devolved.

H. J. Naylor, the deceased in this case, died in September, 1859, intestate, leaving his widow and four children (all of whom were minors) his sole next of kin, and the only persons entitled in distribution, him surviving.

Henry Lainson, a creditor of the deceased, had caused a citation to be issued and served on the widow and children, calling upon them to show cause why administration of the effects of the deceased should not be granted to him as a creditor.

1860.
May 2.

LAINSON v. NAYLOR.

Dr. Tristram moved for administration to be granted to Henry Lainson as a creditor. It appeared on affidavit that the citation had been duly served on the widow and on three of the minor children at Poplar, Middlesex, in her presence, according to the practice of the Court. (*Cooper* v. *Green*, 2 Add. 454.) The other minor (Eliza Ann Naylor), who was of the age of seventeen, was residing in Dorsetshire, in service. The plaintiff had therefore been unable to serve the citation upon her in the presence of her mother or of any one who could be said to have the care or custody of her; a copy of it had been sent to her by post, and she had acknowledged the receipt of it by letter. He submitted that, under these circumstances, the service upon her was sufficient.

SIR C. CRESSWELL: I think it is sufficient.

Motion granted.

May 16.

IN THE GOODS OF HENRY DRUMMOND.

In the Goods of HENRY DRUMMOND (deceased), on Motion.

Will.—Incorporation.—Reference.—Probate.

H. D. made a testamentary disposition on the first page of a sheet of note paper, which was signed by himself, and attested by one witness only. He shortly afterwards duly executed a testamentary disposition (but which contained no reference to the former disposition) on the third side of the same sheet. At the time of the execution he did not mention to the attesting witnesses the writing on the first page, and one of them believed that he asked them to attest his will.

HELD, that the disposition on the first page was not incorporated in the document executed on the third page, and was therefore inoperative. That, as the disposition on the third page related exclusively to real property, it was not entitled to probate.

Note
3 P & D 79

Henry Drummond, Esq., late of Albury Park, in the county of Surrey, died on the 20th of February, 1860, a widower, leaving behind him two daughters, namely, Louisa, the wife

1860.
May 16.

In the Goods of HENRY DRUMMOND.

of Lord Lovaine, and Adelaide, the wife of Sir Thomas R. Gage, Bart., his only children, and the only persons entitled in distribution.

The only documents he had left of a testamentary nature were comprised in a sheet of note-paper, enclosed in a sealed envelope, which he had deposited at his bankers, Messrs. Drummond, of Charing-cross, on the 4th of August, 1857. Upon the outside of the envelope was written, in the handwriting of the deceased, "Codicil to the will of Henry Drummond. Lord Lovaine, executor."

The following are the contents of the sheet of note-paper:—

"Albury Park, 17th November, 1854.

"I leave to my daughter Adelaide anything she pleases to "select as a mark of my affection for her, whether piece of "plate, picture, furniture, or any other thing, for her sole use "during her life, and then to revert to Lord Lovaine; and I "leave all my personal property, of every kind whatsoever, "pictures, books, plate, cattle, horses, carriages, etc., to Lord "Lovaine, and I appoint him my sole executor and residuary "legatee.

"HENRY DRUMMOND.

"Witness to the signature of Henry Drummond,

"HENRY SMITH."

This filled up the first page.

Upon the second page was written: "I leave also to my "daughter Adelaide, Weston House, to her for the term of "her natural life." To this there was no witness.

Upon the third page of the same sheet, beginning at the top, was written: "Lest there should be any doubt or diffi- "culty respecting any land or houses, or other real property "that I may have acquired, built, or in any other manner "become possessed of, I hereby leave and bequeath all such "property to go in the same way as my other landed and "real property is settled.

"HENRY DRUMMOND.

1860. May 16.

In the Goods of HENRY DRUMMOND.

"Witnesses to the signature of H. Drummond,
"HENRY SMITH,
"HENRY GOULBURN,
"Nov. 24, 1854. "HENRY MARION DURAND."

Dr. Phillimore, Q.C., was instructed to move the Court to decree probate of the paper writings bearing date the 17th and 24th of November, 1854, as containing together the will of the deceased, to be granted to Lord Lovaine, as sole executor therein named.

SIR C. CRESSWELL: It is clear that the first bequest relating to the personal property is by itself invalid, not being properly attested. Is there anything to connect it with what is written upon the third page of the sheet? That is the material part of the case, and I do not see that the affidavits filed touch it.

Dr. Phillimore: There are no words of reference in the third page of the sheet: but the question is, whether the fact of both clauses being written on the same piece of paper, together with the circumstances attending the execution of the last clause, is not sufficient to justify the Court in inferring that the execution of the last clause would give effect to the first. One of the three attesting witnesses, the Right Honourable Henry Goulburn, is dead. Smith, the attesting witness to the first and last clause, states that he was not aware, when he signed either of the papers, that they were of a testamentary nature. And Mr. Durand, the other surviving attesting witness, after speaking to the due execution of the will, states in his affidavit as follows: "Although I cannot state positively "that the testator said the paper he asked us to attest was a "will, yet I believe that such was the fact, because I well "remember that I myself proposed or adverted to the expe- "diency of having three witnesses, I having myself when in

1860.
May 16.

In the Goods of HENRY DRUMMOND.

"India executed a will attested by three witnesses, which "number, although not actually required by law, I thought it "expedient to have in case of the death of either of them. "And I well remember, that on this suggestion being made, "the witness Henry Smith, who was the deceased's butler, "was called into the room, where the deceased Mr. Goulburn "and myself were present. I have no recollection whatever "of having upon this occasion observed the said writing con- "tained upon the first sheet." Lady Gage, the only party interested, has filed a consent to the motion.

SIR C. CRESSWELL: The cases are, I think, against you. There is a case very near it (*Doe d. Williams* v. *Evans*, 1 Cr. & Mee. 42), where a codicil was written on the same sheet and same side of the sheet on which an unexecuted will had been written, and Bayley, B., says, "If the codicil had not "referred to the will, I should have thought that it did not "set up that instrument." (See also *In the Goods of Stephen Francis Phelps*, 6 N. C. 695; and *Haynes* v. *Hill*, 7 N. C. 256.) I must reject the motion.

Dr. Phillimore asked for administration with the will on the third page of the sheet annexed to be granted to Lord Lovaine.

SIR C. CRESSWELL: I cannot grant administration with a will annexed which relates only to real property.

1860.
June 12 and 21.

TROTT AND TROTT v. SKIDMORE AND OTHERS.

TROTT AND TROTT v. SKIDMORE AND OTHERS.

Will.—Position of Testator's Signature.—Death of Subscribed Witnesses.

In 1832 B. wrote a will, of which the last sentence concluded with his name. After his death in 1859 the will was produced, with the words, "Witness, C. D. Witness, E. F. April 11, 1838," written below the signature. On proof of the deaths of C. D. and E. F., and of their handwriting, the Court admitted the will to probate as of the date of April 11, 1838.

In this case the deceased Joseph Skidmore died on the 7th of November, 1859.

A will was produced in the handwriting of the deceased, headed:—

"14th of February, 1832.

"27, Marchmont Street, Burton Crescent,

"Middlesex.

"I, Joseph Skidmore, Jun., aged 32 the 29th of July last." By it he left "to my dear wife Sarah Skidmore the whole of "my property, excepting what I shall hereafter name. My "property is at present the lease of the house No. 27, March-"mont Street, goods, stock-in-trade, horse and cart, business, "and all other things that I now enjoy or may hereafter "possess." He made his wife sole executrix, and left certain legacies to his father, mother, brothers, and sisters, and concluded with the following words, "all of which to be paid with "the then present coin of the realm, upon application to my "dear wife Sarah Skidmore, and a receipt to be provided by "the receiver from all further claim upon the estate of their "departed brother Joseph Skidmore." Immediately below this appeared,

"Witness, JAMES SKIDMORE.

"Witness, HENRY EEDE.

"April 11, 1838."

1860.
June 12 and 21.

TROTT AND TROTT v. SKIDMORE AND OTHERS.

The words, "Witness, James Skidmore," had been written, apparently, in much paler ink than the words "Witness, Henry Eede," and the date was in the same handwriting as the latter words.

The executrix Sarah Skidmore propounded the paper as a will bearing date the 11th of April, 1838, reduced into writing and signed by the testator, whose signature was duly acknowledged in the presence of the two attesting witnesses according to the provisions of 1 Vict. c. 26. The executrix died during the pendency of the suit, which was continued by the plaintiffs, as her executors.

The next of kin denied the due execution according to the statute, and the issue came on for hearing before the Court without a jury. It was proved that the body of the will and the signature, "Joseph Skidmore," were in the handwriting of the deceased, that James Skidmore and Henry Eede were dead, and that their names were in their respective handwritings. It was admitted that the body of the will was written in 1832.

Dr. Phillimore, Q.C. (*Dr. Swabey* with him), for the defendants, argued, first, that there was no proof that the words "Joseph Skidmore," in the position they occupied, were intended as a signature at the foot or end of the will; that, in the absence of such proof, to have constituted a valid signing and acknowledgment under the Wills Act and Wills Act Amendment Act 1852, the signature of the testator must have been so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. Secondly, that the presumption *omnia ritè esse acta* had never been acted upon in spite of any contrary presumptions arising on the face of the will and remaining unexplained, such as the great difference in the colour of the ink in which the witnesses'

1860. June 12 and 21.

TROTT AND TROTT v. SKIDMORE AND OTHERS.

names were respectively written, and the repetition of the word "witness" before each name.

Dr. Spinks (*Mr. F. Walford* with him) argued in support of the will. *Cur. adv. vult.*

June 21.

SIR C. CRESSWELL: The will propounded was written in 1832. It is in the handwriting of the testator, and his name forms the concluding words of the last clause of the will. Then follow the signatures of two witnesses and the date, April 11, 1838.

Both the witnesses are dead, and no account has therefore been given of the manner in which the will was executed.

It was said that this would have been a good will, if it had been executed before the statute 1 Vict. c. 26 came into operation, but that as it was executed after the statute had come into operation, it was not a good will, because the words Joseph Skidmore at the conclusion of the last clause could not be considered as the testator's signature, and because it was to be inferred from the difference of the colour of the ink in which the signatures of the attesting witnesses are written, that they had not signed at the same time.

The difference of the colour of the ink in which the names of the attesting witnesses are written might have been caused by blotting-paper being used to one, and not to the other. At all events it is too slight a circumstance to found any presumption on; and on the facts as proved, the usual presumption *omnia ritè esse acta* must prevail.

With reference to the signature, looking at the will itself, at the construction of the last sentence, and at the manner in which the name is introduced, I am of opinion that the testator must have intended his name, as it appears at the end of the will, to be his signature thereto. If he had separated it from the word brother, which immediately precedes it, no one could have entertained a doubt about it.

Decree probate of the will; costs of defendants, by consent, out of the estate.

1860.
June 12 and 21.

TROTT AND TROTT v. SKIDMORE AND OTHERS.

Barlow and *Longden*, Proctors for plaintiffs.
James and *Curtis*, Attorneys for defendants.

In the Goods of ROBERT NODDINGS (deceased), on Motion.

July 18.

In the Goods of ROBERT NODDINGS.

Will.—Executor.—Surviving Executor cited and not appearing.—Grant to Executor of Executor.—20 & 21 *Vict. c.* 77, *s.* 79.—21 & 22 *Vict. c.* 95, *s.* 16.

Where an executor, to whom power has been reserved, survives his acting co-executor, and does not appear to a citation, the grant will go as if his name had never appeared in the will, and the executors, if any, of the acting executor will be the representative of the original testator.

In this case Robert Noddings died in 1835, having made a will and codicil, and thereof appointed Henry Robinson, William Steward (the latter of whom died in his lifetime), and Jeremiah Giscard, executors. The will and codicil were proved in January 1836, in the Prerogative Court of Canterbury, by Henry Robinson, power being reserved to Giscard. Henry Robinson died in July 1850, leaving part of the estate of Robert Noddings unadministered, having made his will, whereof he appointed his wife, Hannah Robinson, and Henry Fisher executors, with a request that Fisher would act in the affairs of Robert Noddings, which he did till the death of Mrs. Noddings, the testator's wife. The testator left certain legacies to his wife absolutely, and gave to his executors and trustees all his ready money and securities for money, upon trust, to pay the interest to his wife during her life, and after her decease to sell securities, call in all sums, etc., and to pay to the

1860. July 18.

In the Goods of ROBERT NODDINGS.

British and Foreign Bible Society £30, to the trustees of the Wesleyan Society at Ely £100, and the rest, residue, and remainder of his said moneys, to the treasurer or treasurers for the time being of the Wesleyan Methodist Missionary Society, in aid of their foreign missions.

Mrs. Noddings died in October 1859. The testator left no real estate, and no known next of kin. Jeremiah Giscard never intermeddled with the estate, and at the death of the testator was a debtor to it in the sum of £150. Giscard left England in 1853, and was supposed to be still living in North America among the Mormons. Before he left England he executed a power of attorney, whereby he appointed his sons his lawful attorneys, with general powers for the management of his estate, but without any powers relative to trusts.

At the instance of the treasurers of the Wesleyan Methodist Missionary Society, a citation calling upon Jeremiah Giscard, and the next of kin, if any, of Robert Noddings, etc. etc., was advertised, and citations were personally served upon Her Majesty's proctor, and on the attorneys, in this country, of Jeremiah Giscard. No appearance was entered to these citations, and her Majesty's proctor declined to interfere.

Dr. Deane, Q.C., moved the Court to decree administration, with the will annexed, of the unadministered goods of Robert Noddings to Fisher, the executor of the testator's acting executor Robinson, or to the treasurers of the Wesleyan Methodist Missionary Society, as principal legatees in the will named. He referred to 20 & 21 Vict. c. 77, s. 79: "Where any per-"son, after the commencement of this Act, renounces probate "of the will of which he is appointed an executor, or one of "the executors, the rights of such person, in respect of the "executorship, shall wholly cease, and the representation to "the testator and the administration of his effects shall and "may, without any further renunciation, go, devolve, and be "committed in like manner as if such person had not been "appointed executor." The provisions of this section are ex-

tended by 21 & 22 Vict. c. 95, s. 16: "Whenever an executor "appointed in a will survives the testator, but dies without "having taken probate, and whenever an executor named in "a will is cited to take probate, and does not appear to such "citation, the right of such person in respect of the executor-"ship shall wholly cease," etc. *Cur. adv. vult.*

1860. July 18.

In the Goods of ROBERT NODDINGS.

SIR C. CRESSWELL: This was a question on the construction of two sections of the Probate and Probate Amendment Acts, referred to by Dr. Deane. Under the 79th section of the original Act, I think it must be taken as if the name of the renouncing executor had never been in the will at all; the effect of the 16th section of the subsequent Act seems to be to extend that provision to the case of a party cited, who will not renounce or take any step. This being so, the executor of the acting executor seems to be the proper representative of the original testator, when the surviving executor of the testator has been cited and does not appear, ~~and the grant will be made accordingly~~. See corrigenda at end of vol and Trade Case 10796 P 129

July 25.

CRISPIN *v.* DOGLIONI.

August 1.

CRISPIN *v.* DOGLIONI.

Interest to oppose a Will.—Judgment of Foreign Court.—Demurrer.

C., being ordered by the Court to declare his interest to sustain a testamentary suit in respect of certain moneys in English funds, alleged in his declaration, among other things, that by the law of Portugal the natural child of a man, not noble, dying intestate and a bachelor, is entitled to all the movable and immovable property of his father; and that C., in a certain suit of filiation and inheritance in the Portuguese Courts, to which the defendant of the present suit and her husband were defendants, obtained a decree declaring C. to be the natural son of H. C., and to be entitled to his property, and ordering the defendants to deliver to C. all property of H. C.,

1860. August 1.

CRISPIN v. DOGLIONI.

which they had in their possession. The defendant, by her plea, traversed many of the averments of the declaration, but admitted that the above judgment of the Portuguese Courts was in fact obtained.

C. replied and demurred, on the ground that the judgment admitted by the plea established his interest. On argument on the demurrer, the Court

HELD, that the judgment as pleaded was not conclusive as to C.'s interest to sustain a suit in this Court, overruled the demurrer without costs, and directed the parties to prove their respective cases.

This case, in its present stage, came before the Court on demurrer. The defendant was one of the surviving residuary legatees in the will of Henry Crispin, deceased; and the plaintiff, by order of the Court, was directed to file a declaration, setting forth his interest to be admitted a contradictor of the will. The plaintiff's declaration alleged accordingly:—

1. That Henry Crispin, late of Faro, in Portugal, was, throughout his life and at the time of his death, domiciled in Portugal.

2. That Henry Crispin died a bachelor and intestate, in 1828, leaving the plaintiff his only and natural child.

3. That the plaintiff was born at Faro, and had all his life been domiciled in Portugal.

4. That by the law of Portugal, when a man, not noble, dies a bachelor, intestate, leaving one natural son only, such son is entitled to succeed to the whole of his father's movable and immovable property.

5. That Henry Crispin was not noble by the law of Portugal.

7. That, under the circumstances, the plaintiff was entitled to the whole of deceased's movable and immovable property; and, amongst other things, to his share in certain stock in the English funds.

8 and 9. That the plaintiff obtained a decree in Portugal, in a suit of filiation and inheritance in the Court of First Instance, at Faro, having jurisdiction, etc., to which Maria Do-

glioni the defendant, and her then husband, were defendants, and had appeared to the suit.

10. That the plaintiff was declared by the judgment of the Court to be the natural son of Henry Crispin, and entitled to his property, and that the defendants were ordered to deliver over to the plaintiff the property of Henry Crispin which was in their possession.

11. That by the law of Portugal the first judgment, unless reversed, was conclusive against all persons, and thereby the plaintiff became entitled to all the property of Henry Crispin.

And further alleged that the defendants carried the cause before the highest Court of Judicature in Portugal having jurisdiction, etc., which confirmed in all respects the judgment of the Court below.

The defendant, Maria Doglioni, by her plea, denied the Portuguese domicil of Henry Crispin; admitted that he died at Faro a bachelor, but denied that he died intestate; denied that the plaintiff was his only and natural child; denied that the plaintiff was born at Faro, and is a domiciled Portuguese subject; denied the law of Portugal to be that the natural son of a man not noble, etc., was entitled to the movable and immovable property of his father; denied that Henry Crispin was not noble by the law of Portugal; denied that the plaintiff at the time of Henry Crispin's death became entitled to his property, including his share in certain English funds; admitted that plaintiff in 1852, being then resident but not domiciled in Portugal, commenced a cause of filiation and inheritance in the Court of First Instance at Faro, against the defendant and her husband, then resident in Portugal, and resident, but not domiciled, within the jurisdiction of the said Court; denied the jurisdiction of the Court of First Instance; admitted that she appeared and defended the suit, and that the plaintiff recovered judgment therein, and was by the sentence of the Court declared to be the natural son of Henry Crispin, and entitled to his property, and that she and her

1860. August 1.

CRISPIN v. DOGLIONI.

husband were ordered to deliver over the property of Henry Crispin which was in their possession; denied the finality of the judgment unless reversed, as against all persons and for all purposes whatsoever, or that the plaintiff thereby became entitled to all the property of Henry Crispin; denied that the said judgment remained of full force and effect; admitted the appeal mentioned in the declaration, but denied the jurisdiction of the Courts; denied that the Supreme Court at Lisbon confirmed in all respects the judgments of the Courts below; alleged that after the judgment of the Supreme Court the plaintiff instituted proceedings in the Court of First Instance, at Faro, called process of liquidation, against the defendant and her husband, and that by order of the said Court attachment and sequestration on all the property of the defendants was awarded by way of security to the plaintiff for the succession claimed by him, but that the order was reversed with costs by the Court of Appeal on the 10th of August, 1857; that no further proceedings had been taken by the plaintiff in the said process of liquidation; and that by reason of the last-mentioned order of the Court of Appeal, the said judgment of the said Court of First Instance at Faro was without force and effect in Portugal; alleged that the said first-mentioned judgment recovered by the plaintiff in the said Court at Faro is, and ought to be deemed and taken to be, of no legal force and effect in this suit as against the said defendant, by reason of the same being contrary to law and justice, and of being on the face of it bad in law.

To this plea the plaintiff obtained leave on summons to reply and demur, and thereupon joined and took issue upon the several allegations in the plea, and demurred thereto on the ground that defendants therein admitted that judgment had been given in plaintiff's favour in the Portuguese Court, and that it therefore appeared on the face of the plea that plaintiff had sufficient interest to enable him to put the defendant on proof of any will.

The demurrer was argued on July 30 by

1860.
July 30.

CRISPIN v. DOGLIONI.

Dr. Phillimore, Q.C., and *Hannen* for the plaintiff. The question is solely whether we have sufficient interest to appear as contradictor of the will? We submit that the judgment of the Portuguese Court, admitted as it is by the defendants' plea, sufficiently establishes that. It has always been admitted that the slightest interest justifies opposition to a will (*Kipping* v. *Ash*, 4 N. C. 177).

Dr. Spinks and *Cleasby* against the demurrer. The object of this suit is different from that in which the foreign judgment relied upon was given, and the terms of that decree do not profess to put the plaintiff in possession of any property out of Portugal, or indeed of any property but such as was in the possession of the defendants. *Cur. adv. vult.*

August 1.

SIR C. CRESSWELL: The question raised in this case was whether the plaintiff upon his declaration had stated facts, of which so much was admitted upon the defendant's plea as to satisfy the Court that the plaintiff had sufficient interest to entitle him to be a party in this suit for the purpose of contesting the will propounded by the defendant.

It appeared that the defendant, Madame Doglioni, set up the will of a person who, I believe, was a foreigner; and that Crispin, the plaintiff, wishing to dispute the will, was ordered to declare and show his interest. He has declared in this manner: that he is the natural child of the deceased, who died domiciled in Portugal a bachelor and intestate; that the deceased was not noble by the law of Portugal; and that by that law, if a person not noble dies intestate, leaving a natural child, that natural child is entitled to his personal and even to his real property. He then goes on to allege that a certain suit was commenced by him in one of the Portuguese Courts, which is called a suit of filiation and inheritance, but he does

1860. August 1.

CRISPIN v. DOGLIONI.

not further explain the nature of it, or the questions which were necessarily involved in it.

It is admitted by the plea that the present defendant, Madame Doglioni, appeared to that suit, and contested the matter in two or three Courts, and that the judgment in favour of Crispin was affirmed in the last Court to which an appeal could be made. All the allegations of the declaration are traversed in the plea except the fact of the suit and the judgment. It is also alleged in the plea that that Court had not jurisdiction over the question; that it will appear on the face of the judgment and the proceedings that that judgment is void from its being contrary to law; and other matters of that sort.

But, assuming that I must take the judgment as it stands, there is certainly nothing but that judgment to show an interest in the plaintiff Crispin, for all the other matters are traversed as questions of fact.

What, then, am I bound to call upon the plaintiff to prove in order to establish his interest? Dr. Phillimore quoted a case (reported in 4 Notes of Cases and 1 Robert.) which was decided by the late Sir Herbert Jenner Fust, in which he held that a possibility of interest was sufficient to enable a party to appear as the contradictor of a will. It occurred to me at the time, that the possibility of interest alluded to in that case did not apply to the possibility of a party filling a character which would give him an interest; but to the possibility of his having an interest in the result of setting aside the will. The *status* of the party alleging an interest, and the right from that *status* to come in and dispute the will, provided there was any personalty to dispose of, was not there disputed. Here the whole question is, whether this person has any *status* which authorizes him to come in and dispute the will. As a natural child of his putative father, he has by our law no right at all to come in, and he must show that by the law of Portugal he has the right to come in and to be in the condition, with refer-

ence to personal property of the deceased, of a legitimate son. But here there is nothing to show that except this judgment, and the judgment does not show that that question was involved in the suit. I cannot, therefore, think that that is sufficient. I think he is bound to make out once, and perhaps once for all, as far as this Court is concerned, that he is the natural son, that his father was domiciled in Portugal, and that by the law of Portugal, his father dying intestate and leaving no other child, he is entitled to come in. All that he must establish once. When he has established that once, and is admitted a contradictor, I do not know that it will be necessary to establish it again, so far as this Court is concerned; but not having established it by evidence, I cannot admit him as contradictor. I do not say that in Portugal he has not that right, because it is possible that such may be the law of a foreign country; but he must prove that the law is as he alleges it to be.

I think, therefore, the demurrer to the plea must be overruled, and that the parties must go on to prove their case. I do not say what would have been the result if the judgment had been pleaded in a different manner, so as to show that the very question had arisen, and that the point had been determined in the Court of Portugal.

Dr. Spinks: Will your Lordship overrule the demurrer with costs?

SIR C. CRESSWELL: No, I think not.

Fielder, Proctor for the plaintiff.
Dyke and *Stokes*, for the defendant.

1860.
November 7.

LANEUVILLE v. ANDERSON AND GUICHARD (intervening).

LANEUVILLE v. ANDERSON AND GUICHARD.

Wills.—French domicil.—Executorship according to French Law.—Law of country of domicil.—Costs.

By the French law, the will of a domiciled Frenchman executed in a foreign country according to the forms required by the law of that foreign country is a valid will.

The appointment by a domiciled Frenchman in an holograph will of an "exécuteur testamentaire" is subject to the rules of the French law, even as respects personal property out of France; and where the French Court had decreed that the time limited by the French law for the execution of such an executorship had passed, and that the executor had no more right to intermeddle in the estate of the testator, and that the parties beneficially entitled were the only persons who had a right to intermeddle, the Court held itself bound by such decree, and refused to grant probate (with respect to personalty in England) to such an executor.

SEMBLE, the law of the country of the domicil at the time of death as to what constitutes the last will of the deceased is binding on other countries.

This was a question respecting the testamentary papers of William Anderson, deceased.

His nephew, William Anderson, one of the parties to the cause, relied upon a will duly executed in the English form, and bearing date the 24th of June, 1843, of which he was left sole executor, and, with the exception of a legacy of £2000, sole devisee and legatee, in case he survived the testator.

The other testamentary paper was in the handwriting of the deceased, and in the following words:—

"Ceci est mon Testament.

"Je, soussigné Guillaume Anderson, rentier, demeurant à "Nogent-sur-Marne, déclare que j'institue pour ma légataire "universelle Madame Catherine Burthé, veuve de feu M. Jean "Louis Titon Laneuville, demeurant aussi à Nogent-sur-Marne, "dans la maison que nous habitons ensemble et ce pour lui "donner une preuve de ma reconnoissance des bons soins

" qu'elle a eu pour moi en France, le tout sans rien excepter et " notamment pour tous les effets mobiliers et tous les biens " meubles, que je possède en France. Fait à Nogent-sur-Marne, " ce 26 Janvier, 1848.

" GUILLAUME ANDERSON.

" P.S. Je soussigné déclare nommer pour mon exécuteur " testamentaire M. Guichard, avocat, demeurant à Paris, rue " Mesiay, No. 58. Nogent-sur-Marne, ce 26 Janvier, 1848.

" GUILLAUME ANDERSON."

This latter will was propounded by Madame Laneuville in the year 1850, in the Prerogative Court of Canterbury, when the learned Judge directed the issue to be confined in the first instance to the question of the domicil of the deceased. And in March, 1853, Sir John Dodson, the then Judge of the Prerogative Court, pronounced in favour of the French domicil, concluding his judgment in the following terms:—" I am of " opinion that this gentleman, having lost, in the first instance, " his *domicilium originis*, having acquired an English domicil, " and having afterwards given up that by selling his furniture, " dismissing his servants, parting with his house in England, " by going to France, where he fixed his abode for the last " years of his life, acquired a French domicil which he never " lost. I must therefore pronounce that this gentleman, at " the time of his death, was domiciled in France."

This decision was confirmed on appeal to the Judicial Committee. (*Anderson* v. *Laneuville*, 9 Moo. P.C. 325.)

The subsequent proceedings before the French tribunals, and the substance of the pleadings on which the case now came before the Court, are sufficiently stated in the judgment.

This case was argued by *Mr. Bovill*, Q.C., *Mr. T. W. Greene*, Q.C., and *Dr. Spinks*, for Guichard, as executor of the will of 1848.

Sir Hugh Cairns, Q.C., and *Dr. Twiss*, Q.C., for Mr. Anderson.

1860.
November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

Dr. Deane, Q.C., and *Mr. Godfrey Lushington*, for two of the children of Madame Laneuville, as her heirs and personal representatives.

Mr. Eddis, for Eli Laneuville, the third child of Madame Laneuville.

July 14 and 15.

Mr. Bovill stated that there were two questions before the Court. First, is the will of 1848 a good will, of which probate should be granted in England as against Anderson? Secondly, if that is answered in the affirmative, is Guichard the party entitled to probate? Since the decision of the Privy Council on the point of domicil, it is clear that the deceased's will must be made according to French law. It is admitted that the will of 1848 is valid by the law of France; but the extent of the will, whether it applies to property out of France, is the first point contested; on that point the judgment of the French court on the 8th of December, 1857, as against Anderson, is conclusive; in that suit the heirs of Madame Laneuville and Anderson were the parties. The will of 1848 consists of two parts—the first dispositive, the second containing the appointment of executor. Suppose the will had been in terms confined to property in France, and then, by a codicil made by a domiciled Frenchman, an executor appointed; such executor, it is submitted, would be entitled to probate in England. Upon the construction of the will, however, we contend that it is not confined to property in France: the construction of the document must be according to French law. (Story's 'Conflict of Laws,' s. 479, a; Westlake on 'Private International Law,' s. 329.) As to Guichard's right to probate as executor, generally, where a person is named executor, and is willing to act, there is no power, according to the law of England, of substituting any one else. Take this as a will made by a Frenchman, intended to act on property in this country; the nomination of executor must be supported

here; the Court has no jurisdiction to vary that, though the depositive part of the will may not, according to the law of this country, take effect. (*Thornton* v. *Curling*, 8 Sim. 310.) But on behalf of the representatives of Madame Laneuville, it will be said that Guichard's executorship has expired, and that the judgment of the Court of Cassation of the 19th of April, 1859, declared this to be the case; that in France an executor appointed by a testator has certain duties and obligations imposed, one of which is to render an account at the end of the year, and bring his administration to a close; and an executor may be appointed with seisin or without. (Code Civil, arts. 1025–6, 1031.) Here, it will be said, is an executor without seisin; the Laneuvilles are in entire possession of the French property, and Guichard's executorship is no more. But we submit that that rule of French law has no application in a foreign country; the judgment of the French courts has no effect on personal property in other countries. (Story's 'Conflict of Laws,' ss. 512–14, 525.) Each country must apply its own laws to protect assets within that country, so the duration of the executorship must be regulated by the laws of each country.

Monsieur Mallampert, Doctor of Law and Advocate of the Imperial Court, was then examined on the points of French law contended for on behalf of Guichard.

Dr. Deane, Q.C., for the Laneuvilles.—Our points are, that the testator died a domiciled Frenchman; that the will of 1848 was decreed by the French courts to be his sole last will and testament, and in that Madame Laneuville is named universal legatee; that by the French law Guichard is no longer executor. From the fact of the French domicil, it follows that the French courts have seisin of the will. What have the French courts decided in the matter? Have they decided which is the last and only subsisting will of the deceased Frenchman, and is their decision binding on the Court?

1860. November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

(*Bremer* v. *Freeman*, 10 Moore P. C. 306; Story's 'Conflict of Laws,' s. 479, g; 1 Jarm. on Wills, 3rd ed. 1844, p. 3; *Enohin* v. *Wylie*, 1 Swab. & Tris. 118; *De Bonneval* v. *De Bonneval*, 1 Curt. 857.) But on the construction of the will of 1848, according to the rules of law obtaining in this country, we submit that the authorities go to this extent, that a general bequest is not limited or affected by a subsequent enumeration of particulars. As to what words will carry general personal estate, see Jarm. on Wills, p. 700. As to Guichard's claim to probate, here is the will of a domiciled Frenchman, written in the French language. For the legal effect of both the expressions "légataire universelle" and "exécuteur testamentaire," recourse must be had to the French law. (*In the Goods of the Countess Da Cunha*, 1 Hagg. 237; *In the Goods of Anne Dormoy*, 3 Hagg. 767; *In the Goods of David Rogerson*, 2 Curt. 656.)

Sir H. Cairns, for Mr. Anderson, relied on the following propositions:—First, that at the date of the will of 1843, Anderson, the testator, was a domiciled Frenchman, and that will was and is valid according to the law of France; secondly, that the will of 1843, containing particular legacies in favour of Mr. Anderson, was not, *quoad hæc*, revoked by the will of 1848, even assuming that will to institute a universal legatee according to the meaning of those terms; but, thirdly, that the will of 1848 instituted, not an universal, but a legatee by universal title, *i. e.* for all the personal property in France; fourthly, that the French judgment of the 8th of December, 1857, is examinable by this court, and constitutes no bar to Mr. Anderson's rights in this court. And even if the Court should, on the construction of the instruments, feel any doubt as to the first and second propositions, it will admit both documents to probate, so as to enable the question of construction to be raised in the courts whose more peculiar province it is to determine questions of construction. The fact asserted in the first proposition is proved by the remarks

made on the appeal to the Privy Council from Sir John Dodson's judgment, 9 Moore, P. C. 284, 355. The law applicable to that fact is to be found in Article 999 of the Code Civil: "Un Français qui se trouvera en pays étranger "pourra faire ses dispositions testamentaires . . . . ou par acte "authentique avec les formes usitées dans le lieu où cet acte "sera passé." As to the second proposition, the construction of the will of 1843 must, it is submitted, be according to the rules of English law; but if this be not so, at least the rules of interpretation applicable are common to both laws, as may be seen on referring to articles 1035–6 of the Code. The terms used in the will of 1843 are specific, and constitute particular legacies, besides the *jus universum;* after leaving a legacy of £2000 to another William Anderson, a cousin, it proceeds: "And as to, for, and concerning my estates of "(naming them), containing by estimation 783 acres, be the "same more or less, severally situate in the barony of Con- "naught, in the county of Limerick, and all other my estates "of freehold, copyhold, and for years, messuages, lands, tene- "ments, hereditaments, and real estates whatsoever and where- "soever situate, etc., and also all my moneys and securities "for money and capital, or stock in the public funds, and all "my personal estate, goods, chattels, credits and effects (subject "nevertheless to, and they are hereby expressly charged with "and made liable to the payment of the said legacy of £2000, "and my just debts, funeral and testamentary expenses), I "give, devise, and bequeath the same, and every part and "parcel thereof respectively, according to the nature or qua- "lity thereof respectively, to my nephew, William Anderson, "his heirs, etc., to and for his and their own use," etc. The learned counsel here cited the following cases:—*Clarke* v. *Butler,* 1 Meriv. 304; *Shuttleworth* v. *Greaves,* 4 Myl. & Cr. 35; *Weld* v. *Acton,* 2 Eq. Cas. Abr. 777; *Freeman* v. *Freeman,* 5 De G. & M. and G. 704. The French law, which we shall prove, is stated in Dalloz. Jurisprud. Gener. (18th of July,

1860. July 16.

LANEUVILLE v. ANDERSON AND GUICHARD.

1831), 186. We contend that the three kinds of legacy there mentioned can coexist.

Argument resumed.—The three sorts of legacy are described in the Code. Art. 1002: "Les dispositions testamentaires "sont ou universel, ou à titre universel, ou à titre particulier." Art. 1003: "Le legs universel est la disposition testamentaire "par laquelle le testateur donne à une ou plusieurs personnes "l'universalité des biens qu'il laissera à son décès." Art. 1010: "Le legs à titre universel est celui par lequel le testateur "lègue une quote-part des biens dont la loi lui permet de dis-"poser, telle qu'une moitié, un tiers, ou tous ses immeubles, "ou tout son mobilier, ou une quotité fixe de tous ses im-"meubles, ou de tout son mobilier. Tout autre legs ne forme "qu'une disposition à titre particulier." Art. 1014: "Tout "legs pur et simple donnera au légataire, du jour du décès "du testateur, un droit à la chose léguée," etc. A universal legacy in a later will is not incompatible with, and therefore does not of necessity revoke, particular legacies in a prior will. *Dalloz, Jurisprudence Générale,* vol. for 1831, p. 186; *The Nismes Case,* February, 1809; *Sirey,* vol. xxviii. p. 128; *The Paris Case,* November 8, 1830; *Dalloz,* vol. for 1833, p. 214; *The Grenoble Case,* June, 1827; *Sirey,* vol. xxviii. p. 188; *Case decided,* February 25, 1836; *Dalloz,* vol. for 1836, p. 46. On the third proposition, that the will of 1848, in fact, only constitutes legacies *à titre universel, i. e.* in respect of the property in France: on this question of construction, how far is the foreign law to be the guide? It is to guide the Court as to technical words and their meaning, but when that is ascertained, this Court is as competent to construe as the Court of the domicil is. The cases cited under the fifth proposition of Wigram's Extrinsic Evidence show how facts may be called in aid of construction. In the present case we have the fact, that the testator's connection with his relations was kept up after his residence in France. His real property remained tied up by the latter provisions of the will of 1843;

he was in correspondence with William Anderson till 1849. As to the terms of the will of 1848, there are no words by which the testator expresses an intention of disposing of all his property; the testator must be taken to have known that he could not by a holograph French will dispose of real property out of France. Without saying that the will of 1848 is that of an illiterate man, it is certainly that of an illiterate Frenchman. On the fourth proposition as to the conclusiveness of a foreign judgment, it is submitted that a foreign judgment is not binding; first, if it offends against principles of international law; secondly, if a foreign judgment professing to proceed on principles of English law, proceeds erroneously on those principles; thirdly, if error be apparent on the face of the judgment; fourthly, if it be against common sense and reason; fifthly, if the Court had no jurisdiction; sixthly, if the object of the suit on which the foreign judgment was rendered be different from the object of the suit in which the foreign judgment is relied upon (*Reimers* v. *Druce*, 23 Beav. 145; *Castrique* v. *Imrie*, 8 W. R. 344; Wheaton on International Law, sixth edit. p. 205.)

July 18.

M. Chevalier de Rosay, formerly practising as an advocate in France, and M. Jules Favre, were then examined as to the French law relied upon on behalf of Mr. Anderson.

At the conclusion of the arguments,

Cur. adv. vult.

November 7.

SIR C. CRESSWELL: This suit was commenced in the Prerogative Court of Canterbury, by Catherine Laneuville, otherwise Burthè, under the following circumstances:—William Anderson died at Paris, on the 23rd of December, 1849, leaving a will made at Nogent-sur-Marne on the 26th of January, 1848. This will was duly registered, and possession of the universal legacy bequeathed to Madame Laneuville was awarded to her by the Civil Tribunal of the First Instance of the Seine on the 9th of January, 1850. Madame Laneuville

1860. November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

then took steps to prove the will in the Prerogative Court; Anderson, the present defendant, having appeared to the warning of the caveat, she brought in an allegation containing many articles: amongst others the twenty-second which stated the *factum* of the will made and executed so as to be good according to the law of France, and others, stating facts tending to show that the testator, who died on the 23rd of December, 1849, was then and at the date of the will domiciled in France. The defendant William Anderson, a nephew of the deceased, brought in an allegation, the nineteenth article of which stated the *factum* of a will bearing date the 24th of June, 1843, executed as required by the statute 1 Vict. c. 26, and of which he was appointed sole executor. The allegation contained many articles stating, *inter alia*, facts tending to prove an English domicil.

The Judge of the Prerogative Court ordered both these allegations to be reformed, leaving in each of them the statement of the *factum* of the will, and the articles relating to domicil, striking out all the rest, so as to confine the inquiry to the question of domicil. Evidence was taken on these allegations, and on the 11th of March, 1853, Sir J. Dodson, then Judge of the Prerogative Court, decided that the testator, at the time of making his will in 1848 and of his death, was domiciled in France.

William Anderson appealed to the Queen in Council, and by advice of the Judicial Committee the decision of Sir John Dodson was affirmed on the 11th of December, 1854, and the cause remitted with all incidents.

This decision having been pronounced, Madame Laneuville, to whom possession of the property of the deceased, as a universal legacy under the will of the 26th of January, 1848, had been awarded as before stated, instituted proceedings before the Judge of the First Chamber of the Civil Tribunal of the Seine, and cited Mr. Anderson and Guichard, the former to hear the will of 1843, if it should be produced, declared to

have been revoked, and that the will of the 26th of January, 1848, should be executed according to its form and tenor; and that consequently, and in conformity with the ordinance awarding possession, dated the 9th of January, 1850, Madame Laneuville should be and remain entitled to take real and effectual possession of all the real and personal property of the testator, wheresoever situate. Guichard was cited to hear it declared that he had no right to meddle with the affairs of the said succession under any pretence whatever, and to hear himself forbidden to intervene therein in his pretended quality as executor. Both Guichard and Anderson appeared, and excepted to the jurisdiction of the Court, the latter on the ground that the testator was a foreigner, and not domiciled in France. Madame Laneuville insisted that the exception was invalid, and that the Court ought to declare effective in France the decision of the Prerogative Court and the Privy Council. The Court, on the 14th of July, 1855, decided in favour of its jurisdiction, and adjourned the cause for a fortnight, for the pleadings on the main question. This decision was, on appeal, affirmed by the Imperial Court of Paris on December 11, 1855.

After this, Madame Laneuville died, leaving as heirs Madame Bovey and Eli and Ferdinand Louis de Laneuville, her three children, and having made a will appointing one —— executor. Disputes arose between the two brothers respecting the validity of a legacy left by Madame Laneuville to her daughter Madame Bovey, and that caused a suspension of the litigation of the Anderson succession. But the suit was resumed in the Tribunal of the First Instance by Madame Bovey and her husband and brothers in April, 1856, as representatives of Madame Laneuville. Certain conclusions were presented on their behalf; none were presented on behalf of Anderson on the main question, and he was declared in default. The Court, on the 9th of May, 1856, gave a judgment, that the suit as against Anderson should be disjoined from that as against Guichard; and, as to the latter, after reciting

1860. November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

that the widow Laneuville was appointed universal legatee of William Anderson, by the terms of his holograph will, which was registered at Paris on the 3rd of January, 1850, that by this same will Guichard was appointed executor, but without seisin; that by ordinance dated the 9th of January, 1850, rendered by the president of this tribunal, Madame Laneuville (there being no privileged heirs of William Anderson) was awarded possession of the said universal legacy; that it was decided by the Prerogative Court of Canterbury and the Privy Council, that William Anderson was domiciled in France when he made his will, from which it followed that he had to make it according to the form required by the country where he then was, and that the tribunals of the same country are competent; that the nature and extent of the office of executor conferred on Guichard must be estimated by French law, and not by English statutes, even for property situate in England; that the holograph will of the testator did not give seisin to Guichard of the property left by him; and if the quality of executor can in certain circumstances continue beyond one year, that quality cannot extend in an indefinite manner and without utility to the realization of the intention of the testator; that Madame Laneuville was sole legatee, and is now represented by her heirs, who alone have an interest in prosecuting the execution of the will of Anderson, and that the assistance of Guichard becomes at this time without an object, etc. Ordered, that the suit against William Anderson, the nephew, be disunited and separated from that against Guichard, to be pronounced on later; declared as expired the executorship of the succession of William Anderson, which he (Guichard) held by virtue of the holograph will dated the 26th of January, 1848; that he has consequently no right or quality to meddle in any way whatever with the affairs of the succession, either in France or England, or to receive any sum or security appertaining to the succession, and especially funds invested in the Bank of England; that such right ex-

clusively belongs to Messrs. Laneuville and Madame Bove
the sole representatives of Madame Laneuville, univers
legatee of William Anderson, etc., and condemned Guichar
in costs. This judgment was affirmed by decree of the Im
perial Court of Paris, 23rd of June, 1857. Guichard the
appealed to the Court of Cassation, and by decree of the 19
of April, 1859, that appeal was rejected. On the 8th
December, 1857, the Civil Tribunal of the First Instance ga
judgment in the suit against Anderson, and decreed that t
alleged will of the 24th of June, 1843, was revoked by t
will of the 26th of January, 1848, and is considered as n
and non-existing; that the will of the 26th of January, 18
shall alone be carried into effect according to its form a
tenor; that, consequently, the heirs of Madame Laneuv
shall be put in possession and enjoyment of all personal
real property belonging to the succession of William Anders
Anderson did not appeal against this decision.

In this country no step was taken between the time w
the order was made by the Privy Council remitting the
and the 31st of January, 1857, when the remission under
was brought in. On the 9th of February, 1857, Guic
intervened. On the 18th of April, 1857, Guichard praye
probate of the will of January 26, 1848, which was oppose
Anderson, who prayed to be heard on his petition, and h
ordered to bring in his act on petition on or before the a
session of Easter Term. At the first session of Micha
Term 1857, Guichard's proctor not having returned the
petition, Anderson's proctor was assigned to bring in t
next Court, in order to the same being heard ex parte.
the second session of Michaelmas Term, Guichard's p
brought in the act. On the 11th of January, 1858, this
first came into existence, and, by operation of the statu
which it was created, the cause was transferred to the new
bunal. In June 1858, an application was made to the C
to hear Anderson's petition *ex parte*, upon the ground

1860. November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

the Judge of the Prerogative Court had made an order that it should be so heard. It was ascertained that some misapprehension on the subject had existed, and the cause stood over in order that the real position of the parties might be ascertained, and the question to be ultimately decided raised in such manner as would enable the Court to deal with it on the merits; and in June 1858, administration with the will of Madame Laneuville annexed was granted by this Court to Ferdinand Laneuville and Madame Bovey, the executor having renounced. On the 4th of February, 1859, Ferdinand Laneuville and Madame Bovey appeared as representing Madame Laneuville, the original plaintiff. In March an order was made by consent of all parties that the affidavits filed and the evidence taken in the earlier stages of the cause should be read as evidence in this suit, saving all just exceptions.

On the 19th of March, 1859, Guichard filed a declaration alleging that William Anderson, a British subject, who died on 23rd of December, 1849, at Paris, a domiciled Frenchman, made his last will and codicil thereto, both bearing date the 26th of January, 1848, and by the codicil appointed Guichard sole executor; that the same were duly executed according to the law of France and were by that law valid and effectual; that they have been respectively duly proved in France, and by the competent tribunal pronounced to be valid and effectual. The defendant Anderson pleaded that the documents mentioned in the declaration were only a partial or limited will, confined to certain property situate in France, out of the jurisdiction of this Court. He then pleaded the will of June 1843, and that he, the defendant, was heir-at-law and sole next of kin of the deceased; and further, that by and according to the law of France the appointment of Guichard as executor by the alleged codicil was not an absolute and unlimited appointment, and that the same had expired before the commencement of the proceedings in this Court, and that Guichard was not at such time entitled to have probate of

the alleged documents, or either of them, or administration of the personal estate of the deceased, and then averred the decision of the Court of First Instance, and that it was affirmed on appeal by the Imperial Court of Paris. Ferdinand Laneuville and Madame Bovey pleaded the death of the testator, the will and codicil made on the 26th of January, 1848; that Guichard, in May 1856, by the law of France, and by orders and decrees of competent tribunals in France, ceased to be and is not entitled to probate of the will and codicil; that the universal legatee, Madame Laneuville, died in January 1856, and that the defendants Ferdinand Laneuville and Madame Bovey are her personal representatives both in England and in France. Eli Titon Laneuville, the third child of Madame Laneuville, appeared in July 1859, and pleaded the will made in France, and prayed probate to Guichard. To the plea of Anderson, Guichard replied that the will made on the 26th of January, 1848, was not a limited will, disposing only of property in France, but disposing of all the testator's property wherever situate, and that it had been so held by the Court of First Instance; secondly, that if the will of the testator of the 24th of June, 1843, was originally valid, it was revoked as to all property wherever situate by the will of the 26th of January, 1848, and that it had been so decided by a formal decree of a competent Court in France; thirdly, that his appointment as executor had not by the laws of France expired, that at the commencement of this suit he was entitled to probate, and that the French Court had not decided that he was not entitled to probate in England; fourthly, that it was not competent to a French Court to limit the powers or regulate the duties of an executor in England, and that if the French Courts have assumed to pronounce that Guichard's functions as executor have expired in England, such decisions are not by the law of England or by the law of nations binding on the Court of Probate. To the plea of Ferdinand Laneuville and Madame Bovey he replied, admitting the will of the 26th

1860. November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

of January, 1848, but denying that his title as executor had expired; secondly, that, although administration with the will of Madame Laneuville annexed had been granted to Ferdinand Laneuville and Madame Bovey, that will was void by the law of France; no evidence was given to support this allegation, and it need not be further noticed. Anderson rejoined, taking issue on the allegations of the replication, and averring that the allegations of the decisions of the French Courts were irrelevant to the merits of the case.

In this form the record was set down, but at the hearing Anderson obtained leave to amend his second plea by averring that at the date of the will of June 1843 the testator was domiciled in France, and that the will executed in England, with the forms required by the law of England, was valid by the law of France. Guichard traversed these averments. The case occupied the attention of the Court for several days. In addition to the evidence taken in the Prerogative Court, a good deal of parol evidence was given, and the several decrees of the French tribunals mentioned in the pleadings were put in, and the whole case was very fully and ably argued for all parties. The following appear to be the material points raised for the consideration of the Court: first, whether the testator was domiciled in France at the date of the will 1843, so as to render that a valid will, and entitled to probate if not revoked; secondly, whether that will was revoked by the will dated the 26th of January, 1848; thirdly, whether this Court is bound by the decrees of the French Court on that point; fourthly, whether Guichard is entitled to probate of the will of 1848, and in this question is included the effect to be given to the decrees of the French Courts, declaring that his title as executor has expired.

The first substantial question in the case is, whether I have one or two wills to deal with, and that depends upon whether the testator had become domiciled in France before the will of 1843 was made; if he had, the evidence proves that the

will was valid by the law of France; if he had not, it became inoperative as to personal property upon the subsequent change of domicil. This point was not much discussed at the Bar; the evidence taken in the original suit furnishes arguments on both sides. But it seems to me that the reasoning of Sir John Dodson, which was approved and adopted by the Judicial Committee, is applicable to this question, and shows that the domicil had then been changed. I must therefore treat each will as good when made, and as continuing so, unless the first was revoked in whole or in part by the second. This is the next question to be considered.

On this point it was contended for the Laneuvilles and Guichard, that the second will in terms disposed of all his property in a manner at variance with his former will, which it therefore revoked by implication, though not expressly; and further, that on this point the Court ought to adopt the decision of the French tribunal, to which it properly belonged to decide what was the last will of a domiciled Frenchman. On the other hand, it was contended that the second will, read by itself, was confined to property in France; that the words "légataire universelle" were to be read in connection with "en France le tout sans rien excepter et notamment," etc., and that so read the will evidently related to French property only. This point gave rise to much ingenious criticism on the words of the will, and on the apparent imperfection of the testator's acquaintance with the French language. But I must assume that the testator knew the meaning and effect of the words which he used. I must ascertain as well as I can the meaning of those words, and assume that the testator intended that they should take effect according to their primary and legal sense, unless he has by other words in the same will, or in some other will to be considered with it, manifested a contrary intention.

As to the primary and legal sense and operation of the words found in this will, parol evidence was given by some

1860. November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

distinguished members of the legal profession in France. I take the result of that evidence to be that the words "légataire universelle," taken by themselves, would have the effect of making Madame Burthè legatee of all the testator's property; but that if they are preceded by specific legacies or bequests, giving in general terms any entire share or portion of the testator's property, the "legs particulier," or "legs à titre universel" of the code, then the words "légataire universelle" would be equivalent to "residuary legatee," and would not be incompatible with other parts of the will; that the same would be the effect if a first will gave specific legacies, and made no "légataire universel," and a second will instituted a "légataire universel;" the two would not be incompatible, the general expression in the second would be explained and controlled by the first. Again, if a first will gave specific legacies, and appointed a "légataire universel," and a second will merely appointed a "légataire universel," he would be considered as substituted for the first, and the specific legacies given by the first will would not be revoked. But if a second will appointing a "légataire universel" contains other words showing that the technical expression is used in its primary sense, and that the intention is to give all to the legatee, then it is incompatible with any different disposition in a former will, and of necessity revokes it. In order to entitle themselves to the benefit of this evidence, Sir Hugh Cairns and his juniors contended that the will of 1843 gave specific legacies to W. Anderson, since deceased, and to the present defendant, W. Anderson, and then made the latter residuary legatee. On the other hand, it was said that the legacy to the W. Anderson, deceased, could have no effect, for he was dead, and the testator knew it, before the second will was made, and that as to W. Anderson the defendant, the testator had not given him specific legacies, but, intending to make him residuary legatee, enumerated the various items of his property, and, lest anything should have been omitted, added the general words.

It seems to me unnecessary to express an opinion upon this somewhat difficult question, for, as I construe the second will, the testator has shown on the face of it that he used the words "légataire universelle" in their primary and legal sense, and therefore they would be incompatible with the former will, and as to personal property, would revoke it. The testator begins by instituting Madame Burthè his "légataire universelle;" then, by words which must be read as in a parenthesis he explains his reason for so doing, "et ce pour lui donner," etc. Sir Hugh Cairns contended that this parenthesis, ends with the word "moi," and that the words "en France," which follow, must be read in connection with "le tout sans rien excepter," so as to confine the bequest to property in France. But that I think a very forced construction. The attentions of Madame Burthè had been bestowed upon him in France; why should we suppose that he did not intend to mention that? And if he meant to give all in France and nothing more, it is more natural to suppose that he would have written "le tout en France." Assuming that he was a bad French scholar, and might be expected to think in English, and then as it were translate into French, I cannot but think it more probable that he would use the latter expression if he meant to confine his bequest to property in France. Counsel on each side claimed the benefit of that which follows, "et notamment," etc. I can do no more than guess at the testator's reason for introducing these words; they have no legal operation in controlling the former part of the will, and I think furnish no foundation for any judicial opinion on the subject, and I forbear to indulge in guesses.

Upon this part of the case, then, I am of opinion that the testator has expressed an intention to constitute Madame Burthè his légataire universelle, so as to take all without any exception, and consequently that the will of 1843 was thereby revoked.

There was some discussion at the Bar as to the use which

1860. November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

might be made of the evidence taken in the Prerogative Court in construing the second will of the testator, and it was insisted for Mr. Anderson that, according to the fifth proposition maintained in Sir J. Wigram's excellent work on this subject, I ought to take into consideration that the testator had a large estate in Ireland and considerable personal property in England; that in the will of 1843 he showed a great desire to keep the real property in his family as long as possible; that he continued to correspond with his nephew on good terms, and other matters of that nature. On the other hand, it was admitted that I ought to consider all the material circumstances by which he was surrounded, but that I could not take into consideration such parts of the evidence as were material only as tending to raise a presumption as to the intention of the testator: this I take to be the correct rule, and this latter portion of the evidence I have discarded, but if considered it would not alter my opinion as to the meaning of the will. There is another of Sir James Wigram's propositions, viz. the fourth, which appears to be somewhat applicable to the case: "Where the language of the will is not understood by "the Court, the evidence of persons who understand the lan- "guage in which the will is written is admissible, to inform "the Court of the proper meaning of the words."

Now in this case the language of the will is not understood by the Court, and evidence was given as to the proper meaning of the words, *i. e.* a sworn translation brought into the Prerogative Court, as to the true meaning of which I have already given my opinion; but I understood the distinguished French advocate Jules Favre to say that the proper meaning of the words "légataire universelle" combined with "le tout sans rien excepter" was, that the legatee should take all without exception, but that in construing those words it must be remembered that the testator was imperfectly acquainted with the French language, and had probably been induced to use words the proper meaning of which he did not understand.

I am not at liberty to act on any such conjecture; no suggestion of that nature appears on the record, and I must assume that the testator understood the proper meaning of his own words. I find therefore in the evidence of Jules Favre a confirmation of my own opinion as to the meaning of the will.

The third point was much discussed at the Bar, viz. whether this Court is bound by the decree of the French Court of the 8th of December, 1857. Anderson in his rejoinder averred that the French decrees pleaded were irrelevant to the merits of the case; counsel rather relied upon special objections to the decree of December 1857, than upon its general want of relevancy. It would be difficult to establish that the tribunals of the country of the domicil have not jurisdiction to decide upon what is or is not the last will of a testator in respect of personal property. In *De Bonneval* v. *De Bonneval*, 1 Curt. 856, probate was prayed of the will of the Marquis de Bonneval deceased; this was opposed by his brother, on the ground that the testator was domiciled in France; that question was discussed on act on petition, and Sir Herbert Jenner Fust made this decree: "That the deceased at the "time of his death was a domiciled subject of France, and that "the Courts of that country are the competent authority to "determine the validity of his will and the succession to his "personal estate; and, as in the case of *Hare* v. *Nasmyth*, 2 "Add. 25, the Court suspends the proceeding here as to the "validity of the will till it is pronounced valid or invalid "by the tribunals of France." Again, in *Price* v. *Dewhirst*, 4 Myl. & Cr. 82, Lord Cottenham said, "The law of the "country in which the deceased was domiciled at the time of "his death not only decides the course of distribution or succession as to personalty, but regulates the decision as to "what constitutes the last will." And the evidence given in the present case showed that the Court which decided what was the last will of the testator was also a Court of construction, and had jurisdiction to decide upon its meaning and operation.

1860. November 7.

LANEUVILLE v. ANDERSON AND GUICHARD.

It is not necessary that I should say whether I consider this decree binding on this Court. If there is an appeal from my judgment, the decree will be before the House of Lords, and the parties who contend that it is binding may there, if necessary, have the benefit of that argument.

It remains then to be considered whether Guichard has a right to be treated as executor by this Court. His claim was very ably and forcibly pressed by his counsel, who contended that the decrees of the French tribunals could not affect that right; that the testator having selected Guichard as his executor, his rights as executor must be determined, with reference to the property in England, by the law of England; that the law of France could have no extra-territorial effect, and that the appointment of Guichard being general, and not for a limited time, this Court could not do otherwise than treat him as executor; that the Court had no power to set aside the choice of the testator, and give the execution of the will to another; that the power to select the party who is to administer the estate of a deceased person exists only where no executor is appointed, or where he has renounced, or where there is an intestacy. With regard to the assertion that the appointment of an executor in a French will is by law for a year only, the practice of the Prerogative Court was appealed to, the grant of probate of French wills having always been general; whereas, if the appointment was for a year only, the grant of probate should be limited to that time. The practice certainly has been as stated, and the argument founded on it is ingenious, and it may on future occasions give rise to questions not easily solved. But it is one thing to say that a party appointed in general terms is entitled to probate in terms as general, leaving the question of the determination of the authority conferred to be decided by matter subsequent, and another thing to say that when the time within which the functions of an executor should have been discharged has expired, he is nevertheless entitled to come to this Court and claim

probate. *Dormoy's* case, 3 Hagg. 767, is against him; and with reference to that right I think I am bound by the decrees of the French Courts which have been given in evidence. The will was that of a domiciled Frenchman, the succession to be dealt with was therefore French, and all personal property is by fiction of law in the place where the testator dies domiciled. The rights in England of an executor to whom probate has been granted by an English Court, must be regulated by English law, but the meaning and effect of the appointment of an "exécuteur testamentaire" in such a will as that made in France by a domiciled Frenchman is a question of French law. Seisin or possession of the property was not by such an appointment given to the executor, nor was the property vested in him; and it was by the proper authority given to the universal legatee. Under such circumstances, the Court of First Instance declared that the testamentary executorship which Guichard had of the succession of the testator had expired; that he had no right to interfere in any manner in the affairs of the succession either in France or in England, nor to receive any sum or effects composing such succession; that such right belonged only to the representatives of Madame Laneuville, the universal legatee. This judgment was affirmed on appeal by the Imperial Court of Paris adopting the reasons of the former judges; a further appeal to the Court of Cassation was rejected by decree of the 19th of April, 1859. It was said that the recitals or grounds of that decree show that the Court did not decide upon the question; but I do not so construe them; and it seems to me that it adopts the decision that Guichard's rights as executor had ceased. The French Courts, then, having decided that the office conferred upon Guichard had expired before he filed his declaration in this suit, upon what ground can I recognize him as still entitled to it? As granting probate here of a foreign will, the Court is auxiliary to the Courts of the testator's country. By granting probate to Guichard I should confer upon him a right to

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

(*Before* LORD CAMPBELL, C.J., POLLOCK, C.B., *and the* JUDGE ORDINARY.)

1858.
May 10.

HORNE *v.* HORNE.

HORNE *v.* HORNE.

Dissolution of Marriage.—Bigamy coupled with Adultery.— 20 & 21 *Vict. c.* 85, *s.* 27.

SEMBLE (per Pollock, C.B.), that, in a suit for a dissolution of marriage on the ground of bigamy with adultery, there should be proof of adultery and bigamy with the same woman. Proof of a bigamous marriage with one woman and of adultery with another is not sufficient.

This was a suit promoted by the wife against the husband for a dissolution of their marriage: (1) by reason of his adultery coupled with bigamy; and (2) by reason of his adultery coupled with desertion.

Mr. Slade, Q.C., and *Dr. Spinks* appeared for the petitioner. Proof was given of the respondent's marriage with the petitioner, and of his having subsequently (in October 1854) contracted a bigamous marriage with Sarah Brown; but there was no evidence that he had committed adultery with her. It also appeared by the evidence that he had been guilty of adultery with a Miss Crispe, and had deserted his wife for upwards of ten years.

1858.
May 10.

HORNE
v.
HORNE.

LORD CAMPBELL, C.J.: The petitioner is entitled to a decree for a dissolution of her marriage, the husband's adultery with Crispe and desertion for two years without reasonable excuse having been proved.

POLLOCK, C. B.: I am of the same opinion. It has been satisfactorily proved that the respondent has been guilty of adultery with Miss Crispe, and of desertion of his wife for two years without reasonable excuse.

If the application had been founded merely on that part of the 27th section of the Divorce Act which makes "bigamy "with adultery" a ground for dissolving a marriage, I should have thought that the petitioner had not made out her case, for I think "bigamy with adultery," in that section, means adultery with the person with whom the bigamy is committed, and consequently that proof of adultery with that person should be given, *e.g.* that there should be some evidence of their having lived together as man and wife. It would not be sufficient, in my opinion, to prove a bigamous marriage with one woman, and adultery with another.

(*Before the* JUDGE ORDINARY, *on Motion.*)

November 4.

MARCH
v.
MARCH.

MARCH *v.* MARCH.

Evidence.—Petition for Dissolution of Marriage.—Bigamy.—Proof by Affidavit.—Practice.—20 & 21 *Vict. c.* 85, *s.* 46.

A husband was convicted of bigamy in 1852. The wife petitioned for a dissolution of their marriage on the ground of his bigamy and adultery. The witnesses to the facts to be proved were resident at Oldham or Huddersfield.

The Judge Ordinary directed that the petition might be proved by affidavit.

In this case the wife had filed a petition for the dissolution

1858. November 4.

MARCH v. MARCH.

of her marriage on the ground of her husband's bigamy coupled with his adultery. The husband had been tried for bigamy before the Judge Ordinary in December 1852, and convicted. All the witnesses to the facts which it was necessary for the petitioner to prove were resident either at Oldham or Huddersfield.

Dr. Spinks moved the Court, under the 46th section of 20 & 21 Vict. c. 85, to direct that the petitioner should be at liberty to verify her petition by affidavit. Great expense would be thereby saved.

THE JUDGE ORDINARY: I will make the order; but you must remember that the bigamy must be proved. Proof of the conviction of bigamy will not suffice.

1858. December 20. And 1859. January 13.

COOKE v. COOKE AND QUAILE.

(*Before the* JUDGE ORDINARY.)

COOKE v. COOKE AND QUAILE.

Dissolution of Marriage.—Practice.—Return of Citation when Personal Service has been dispensed with.—Directions as to mode of Trial.—Commission to examine Witnesses.—Commissioner selected by the Court.

The citation must be returned into and filed in the Registry, even where personal service has been dispensed with, before the Court will give directions as to the mode of trial.

Where the only witnesses to the acts of adultery relied upon are resident in a brothel, and there is consequently a risk of their evidence being lost, the Court will allow a Commission to issue for their immediate examination.

In the absence of the respondents, the Court, and not the petitioner, should select the Commissioner before whom the evidence is to be taken.

1858.
December 20.
And
1859.
January 13.

COOKE
v.
COOKE AND QUAILE.

This was a suit for dissolution of marriage on the ground of the wife's adultery with the co-respondent. The respondent and co-respondent had gone to Australia; the citations and copies of the petition had been transmitted to a solicitor's firm at Melbourne for the purpose of personal service; but as no trace could be found of either the respondent or co-respondent, notwithstanding various inquiries had been made for them, the Judge Ordinary had dispensed with personal service. The citations had not been returned from Australia.

December 20.

Dr. Swabey moved the Court for directions as to the mode of trial. It has been intimated in the Registry that this motion cannot be granted until the citations have been filed. By rule 13 (1858), "After personal service of the citation has "been effected, the citation, with the certificate of service in- "dorsed thereon, shall be forthwith returned and filed in the "Registry." This does not apply to a case where personal service has been dispensed with, and there is no rule applicable to such a case. If this motion cannot be granted until the citations have been returned and filed, the hearing of the petition will be greatly delayed.

THE JUDGE ORDINARY: In the Registry it is always considered that they cannot be said to have seisin of the cause until the citation has been returned. The citation is the first step in the record. There can be no record unless it appears that a citation has been returned and filed. By the old practice the citation was always returned into the Registry. I think the citation should be returned and filed before I can grant this motion.

January 13.

Serjeant Pigott (*Dr. Swabey* with him) renewed the motion. We are now in a position to urge a further reason for granting this application. The only act of adultery on which the petitioner relies was committed in a brothel at Liverpool. The

1859. January 13.

COOKE v. COOKE AND QUAILE.

only witnesses to the adultery are resident in this brothel. It is doubtful whether they will be forthcoming if the cause is postponed.

THE JUDGE ORDINARY: I cannot accede to this application. I think I ought not to depart from the old practice in the Registry. According to the old practice, the proceedings could not go on until the citation had been returned. The requiring the citation to be returned is not a mere matter of form; it is necessary in order that evidence may be preserved that the proper steps have been taken. There would be nothing to show in the Registry that a citation had ever issued, unless it were returned and filed. With respect to the fresh ground urged to-day, viz. the difficulty of ensuring the presence of the witnesses at the hearing, that inconvenience may be provided against by having their evidence taken now.

Serjeant Pigott moved, under section 47 of the Divorce Act, that the evidence of those witnesses should be taken under a Commission, either in London or before A. B., a solicitor, at Liverpool.

THE JUDGE ORDINARY: I think it better they should be examined at Liverpool. In the absence of the respondents, I do not think I should appoint any person as Commissioner, however respectable, who is suggested by the petitioner. I will name some one myself.

1859.
November 28.

BACON
v.
BACON AND
BACON.

(*Before the* JUDGE ORDINARY, WATSON, B., *and* HILL, J.)

BACON *v.* BACON AND BACON.

Dissolution of Marriage.—Right to begin.—Right to Cross-examine.

Where a respondent in her answer has not traversed the adultery alleged in the petition, but sets up countercharges of adultery, cruelty, and misconduct, upon which countercharges issue has been joined, upon a trial of these issues before a jury, it is for the respondent to begin.

When these issues have been disposed of by the jury, it is not competent to the respondent to cross-examine the witnesses called to establish the allegations in the petition, either as to these allegations or as to the countercharges contained in the answer.

The petition in this case was filed by Samuel Bacon for the dissolution of his marriage on the ground of his wife's adultery. The respondent filed an answer, in which she did not traverse the acts of adultery alleged in the petition, but charged the petitioner with having been guilty of adultery, cruelty, wilful neglect, and of misconduct which had conduced to her adultery.

Upon the charges set up in the answer issue had been joined, and these issues came on for trial before the Court and a common jury.

Dr. Spinks (*Mr. Francis* with him), for the petitioner, submitted that as the respondent had not traversed the charges of adultery contained in the petition, the onus was upon her to establish the countercharges contained in her answer, and that she ought to begin.

Dr. Phillimore, Q.C. *contrà*. The respondent is not bound to prove the countercharges contained in the answer until the petitioner has established the adultery alleged in the petition.

1859. November 28.

BACON v. BACON AND BACON.

The case of the respondent will depend in a great measure on the cross-examination of the petitioner's witnesses.

THE JUDGE ORDINARY: There can be no difficulty in acting upon the common law rule. The intention of the Legislature was that issues of facts should be tried as in the Courts of common law. The jury have nothing to do with the respondent's adultery. It is taken out of their cognizance by the pleadings. If any injustice could arise to the respondent by her being required to begin, we might take it into our consideration. But there is really no hardship on her; for if she relies on the petitioner's witnesses to make out her case, she may call them herself.

Dr. Phillimore opened the respondent's case, and called witnesses in support of the charge of cruelty. On the other issues no evidence was tendered.

The jury found a verdict for the petitioner on all the issues, and were thereupon discharged.

Witnesses were then called to prove the wife's adultery.

Dr. Phillimore proposed to cross-examine them as to the adultery charged in the petition, as also as to the cruelty alleged in the answer.

Dr. Spinks objected.

THE JUDGE ORDINARY: Dr. Phillimore cannot cross-examine the witnesses upon these pleadings. The adultery has not been denied, and the charge of cruelty has been disposed of by the jury.

The adultery was proved, and the petitioner pronounced entitled to a decree dissolving the marriage, which was sus-

pended to allow time for an application to be made under the 45th section of the Divorce Act for a settlement of some property, to which the wife was entitled, on the children of the marriage.

1859.
November 28.

BACON
v.
BACON AND BACON.

(*Before the* JUDGE ORDINARY, *on Motion.*)

BEVAN *v.* M'MAHON AND BEVAN (falsely called M'MAHON).

February 15.

BEVAN
v.
M'MAHON AND BEVAN (falsely called M'MAHON.)

Commission.—Reopening of Commission to enable a Witness to supply omissions in his Evidence.— Discretion of Court.

It is in the discretion of the Court to re-open a Commission, so as to enable a witness, who has been already examined, to be examined again: but it is a discretion to be sparingly exercised.

Where a witness had been examined, re-examined, and cross-examined before a Commissioner, the Court refused to re-open the Commission to enable him to supply important facts omitted in his evidence, although he deposed that it was in consequence of the respondent's personal observations and interruptions during the examination that he forgot to mention them at that time.

If the Commissioner had reported that the respondent had so conducted himself during the examination as to disturb the mind of the witness, the Court would have acceded to the application.

This was a suit of nullity of marriage by reason of fraud, instituted by the father of the alleged wife.

The petitioner obtained an order, under the 47th section of the Divorce Act, for a Commission to examine J. T. Smith, who was about to leave this country for Australia. On February the 7th, 1859, Smith was examined, at Plymouth, and on the next day he made application to the Commissioner to be permitted to make certain material additions to his evidence, on the ground that they had escaped his recollection at the time of the examination, in consequence of the frequent personal observations and interruptions interposed by the respondent.

1859. February 15.

BEVAN v. M'MAHON AND BEVAN (falsely called M'MAHON.)

Affidavits by Smith and the petitioner's solicitor to this effect were filed in the court. The petitioner's solicitor also deposed in his affidavit, that Smith had stated to him the very facts which he omitted to mention in his examination some months prior thereto, and that in his opinion it would not be safe for the petitioner to proceed to trial without the evidence of Smith as to these facts. The Commissioner also made an affidavit stating that to the best of his belief the statement of Smith as to his having omitted to mention those facts was made spontaneously.

Mr. W. Brandt moved the Court to order that the Commission should be reopened, to enable Smith to supply the omission in his evidence. The application was of an unusual character. The Court had a discretionary power in the matter, and he submitted that under the circumstances it should grant the application. This omission of the witness to state facts referred to was entirely caused by the respondent's misconduct, and not through any default of the petitioner or the witness.

Mr. Aspland, contrà: The courts of common law have declined to reopen a Commission on the grounds relied on.

If the Court has discretionary power in the matter, the facts of this case are not sufficient to justify it in exercising it. He cited *Lumley* v. *Gye*, 3 Ell. & Bl. 114.

Mr. Brandt in reply: The case of *Lumley* v. *Gye*, which has been referred to, has no application to the point raised in this case.

THE JUDGE ORDINARY: This application is one of a most unusual character. I never before remember an application having been made to allow a witness, who had been examined under a Commission, to undergo a second examination, because he had, on his first examination, forgotten to state facts material to the case.

1859.
February 15.

BEVAN
v.
M'MAHON AND BEVAN (falsely called M'MAHON).

It is certainly in the discretion of the Court to grant the application, and I should grant it, if I believed the interests of justice required me to do so. But in my opinion it would be exceedingly dangerous to accede to it: it is quite unprecedented; and I shall therefore reject it.

Take the case which most nearly resembles the present one. Suppose a witness has been examined, cross-examined, and re-examined in court, and then dismissed, and counsel were to ask for him to be recalled, in order that he might add something to his evidence, which, in consequence of his being flurried, he had forgotten to state during his examination. The Court would in such a case be able to judge from the demeanour of the witness, from the manner in which he gave his evidence in the witness-box, whether his memory was likely to have been so far disturbed as to make it probable that he had made such an omission in his evidence. Even in such a case, I should not look upon the application with much favour; for I have always been very sparing in allowing a witness to be recalled, and whenever I have suspected that he was being again brought forward to meet the stress of the case, I have invariably refused to accede to it. There are much stronger objections to granting the application in this case. It is by an indulgence that the witness has been allowed to be examined before the Commissioner instead of in open court. This alone would make me feel some reluctance in granting the application. It moreover appears that the witness is about to leave the country; he will therefore not be amenable to the temporal consequences of a false oath,—the Court will have only the religious sanction of the oath. It appears also that the witness was not only examined, cross-examined, and re-examined, but that the evidence was afterwards read over by the Commissioner in his presence and that of the party who called him, and that it was then signed by him. It is hardly to be supposed, that if the witness had omitted anything of importance, he would not then have remembered it and supplied it.

1859. February 15.

BEVAN v. M'MAHON AND BEVAN (falsely called M'MAHON).

If the Commissioner had reported that the respondent had misconducted himself during the examination, had endeavoured to throw the examination into confusion, and had disturbed the mind of the witness, I should have allowed him to be examined again. But he does not state this. Upon the evidence before me, I think that it would be extremely dangerous, and that the interests of justice might be prejudiced, if I were to allow a second examination of this witness. If his evidence is of so great importance, let the petitioner get him to delay his departure for Australia, so that he may give evidence at the hearing in open court.

June 22.

BEVAN v. M'MAHON AND BEVAN (falsely called M'MAHON).

(*Before the* JUDGE ORDINARY, *on Motion.*)

BEVAN *v.* M'MAHON AND BEVAN (falsely called M'MAHON).

Petition for Decree of Nullity.—Death of Petitioner.—Interest to commence or continue Suit.

Under 43 Eliz. c. 2, s. 7, it has been decided that a father has sufficient interest to institute a civil suit to establish the nullity of his daughter's marriage; but where a father died after such suit was instituted, and the pleadings were finished, but before the trial, the Court

HELD, that it had no authority to allow the mother, who was also the executrix of the father, to take up the suit at the point at which it was left at the father's death.

This was an application arising out of a petition for a decree of nullity filed by the petitioner in respect of the marriage of his daughter Margaret Lea Bevan, one of the respondents, with James M'Mahon, by reason of undue celebration under the statute. Such a petition was competent to the father, according to the case of *Ray* v. *Sherwood and Ray*, 1 Curt. 173, 193, and (on appeal to the Privy Council) 1 Moore, P. C. 402, where their Lordships held, that the statu-

1859.
June 22.

BEVAN
v.
M'MAHON AND BEVAN (falsely called M'MAHON).

tory liability of the father to maintain his grandchildren gave him a sufficient interest to sustain a civil suit of this description. 43 Eliz. c. 2, s. 7, enacts "that the father and grandfather "and the mother and grandmother and the children of every "poor old blind, lame, and impotent person not able to work, "being of a sufficient ability, shall at their own charge re- "lieve and maintain every such poor person in that manner "and according to that rate as by the justices of the peace "of that county where such sufficient persons dwell, or the "greater number of them, at their general quarter-sessions, "shall be assessed, upon pain, that every one of them shall for- "feit 20*s.* for every month which they shall fail therein."

June 15.

The respondent, James M'Mahon, appeared, and demurred to the petition; he also filed an answer traversing some of the facts alleged, and likewise pleading in confession and avoidance.

The petitioner replied (1) by traversing the answer; (2)[1] by setting up matter in confession and avoidance.

He also demurred to the answer.

The petitioner died before the case was set down for hearing.

June 15.

Mr. W. Brandt now moved the Court on behalf of the widow and executrix of the late petitioner, that she might be allowed to take up and continue the suit in the position in which it stood at the time of the petitioner's death, on entering a suggestion of his death on the record.

Mr. Aspland for the respondent M'Mahon, did not object to

[1] Before THE JUDGE ORDINARY in chambers, on summons.

Mr. Aspland submitted that so much of the replication as pleaded matter of confession and avoidance should be struck out, on the ground that leave to reply and demur at the same time had not been obtained.

Mr. W. Brandt contrà.

THE JUDGE ORDINARY rejected the application, saying that in this court it was not necessary to obtain such leave.

1859. June 22.

BEVAN v. M'MAHON AND BEVAN (falsely called M'MAHON).

the revival of the suit, but apprehended that, as the present applicant had no interest sufficient to have entitled her to commence the suit, any sentence pronounced under the present circumstances of the case would be invalid. *Cur. adv. vult.*

THE JUDGE ORDINARY: This was a suit for a declaration of nullity of marriage instituted by the father of a lady, one of the respondents in the suit, who is alleged to have contracted a marriage with James M'Mahon, the other respondent. In *Sherwood* v. *Ray*, a father was allowed by the Judicial Committee of the Privy Council to maintain such a suit in respect of his daughter's marriage, on the ground that he had a pecuniary interest—no other interest being recognized by law—in inquiring into its validity. For it was said that if the marriage in that case was held to be valid, and the daughter had children, and they were cast upon the parish for support, he, as grandfather, under 43 Eliz. c. 2, s. 7, might possibly be called upon to maintain them. That somewhat remote liability was considered to give him a sufficient interest to entitle him to maintain the suit.

In the present case, Mr. Bevan had a right to proceed on the ground that his interest might be similarly affected, if this marriage were held to be a valid one. He accordingly commenced proceedings: the suit had progressed a considerable way when Mr. Bevan died; and I am now asked to allow Mrs. Bevan, his widow and executrix, to take up the suit at the point where he left it. I am of opinion that I have no authority to do so. The case is of a painful character, and there are circumstances which render it very desirable that it should be inquired into, and if the marriage is null and void, that it should be so declared; but I have no power to substitute the widow for the husband in order that the suit may be carried on. When the suit was commenced, she had no interest in it, and could not then have instituted it; she was not at that time liable under 43 Eliz. c. 2, s. 7, to be called upon

to maintain her grandchildren (if any), as the statute confers no power of charging the grandfather and grandmother jointly with their maintenance. Mr. Bevan's estate does not remain liable to this obligation, and Mrs. Bevan cannot therefore carry on the suit in her character as executrix. The suit abated on the death of Mr. Bevan, and I must reject the application.

1859.
June 22.

BEVAN v. M'MAHON AND BEVAN (falsely called M'MAHON).

(*Before the* JUDGE ORDINARY, *on Motion.*)

1860.
May 24.

PALMER *v.* PALMER.

Wife's Petition for Dissolution.—Cruelty condoned.—Subsequent Adultery.

PALMER v. PALMER.

All condonation is conditional on no offence of which the Matrimonial Court can take cognizance being in future perpetrated. Cruelty once condoned may be so revived by subsequent adultery as to form, coupled with that adultery, ground for a sentence of dissolution.

This was a petition for dissolution of marriage at the suit of the wife, on the grounds of cruelty and adultery. The answer of the husband denied the cruelty and adultery, and, among other things, pleaded condonation of the cruelty; the reply took issue on the allegations in the answer, and further pleaded that the cruelty, if condoned, was revived by the subsequent adultery.

Mr. Murray, for the respondent, now moved the Court to direct this part of the replication to be struck out on the ground that cruelty, once condoned, could not be revived by subsequent adultery; the reviving act must be *ejusdem generis.* With respect to the state of the law before the present Divorce Act, he contended that there was no decision fully in point. He cited and remarked upon *Hart* v. *Hart,* 2 Eccl. & Adm.

1860. May 24.

PALMER v. PALMER.

193; *Durant* v. *Durant*, 1 Hagg. 760, and cases there cited. As to the present statute, which gave the wife power to petition for a dissolution of marriage under certain circumstances, he contended that the Legislature must have intended the adultery and cruelty, *ex. gr.*, to be distinct offences co-existing at the same time; not that cruelty committed twenty years back and forgiven, should be revived by, and so coupled with, a subsequent act of adultery, as to found a sentence of dissolution.

Dr. Spinks, in support of the paragraph of the replication, argued that the term *ejusdem generis* used by Sir John Dodson in *Hart* v. *Hart*, must be understood of any act which would lay the foundation for a sentence in a matrimonial Court; in the then state of the law desertion was not such an act. The principle of the doctrine of revival is, that all condonation is conditional. In the words of Sir John Nicholl, in *Durant* v. *Durant*, 1 Hagg. 762, the plainer reason and the good sense of the implied condition is, that "you shall not "only abstain from adultery, but shall in future treat me—in "every respect treat me (to use the words of the law)—with "conjugal kindness; on this condition I will overlook the past "injuries you have done me." In principle it seems impossible to distinguish between adultery revived by cruelty, and cruelty revived by adultery, with respect to the state of the law before the Divorce Act.

THE JUDGE ORDINARY: I cannot accede to this application. The cases cited establish that, if a marital offence which might have been the foundation of a sentence in a matrimonial Court has been condoned, it is revived by any subsequent offence which might itself have been the ground of a sentence of divorce *à mensâ et thoro*: and this on the ground that condonation is always assumed to be conditional, and the condition extends not only to a repetition of the same, but of any other

marital offence which falls within the cognizance of a matrimonial Court. With respect to observations made on the supposed intention of the statute, I can see no reason why the husband should be placed in a better position by the lenity and forbearance of his wife than he would have been if she had not forgiven the first offence.

1860. May 24.

PALMER v. PALMER.

(*Before the Full Court*,—THE JUDGE ORDINARY, MARTIN, B., *and* WILLES, J.)

May 29.

FURNESS v. FURNESS.

FURNESS *v.* FURNESS.

Bigamy and Adultery.—Condonation.—Revival.

QUÆRE, whether the husband's bigamy condoned by the wife would be revived by his subsequent marital misconduct so as to found a sentence of dissolution of marriage.

This was a petition for dissolution of marriage, at the suit of the wife, by reason of adultery, coupled with bigamy, and adultery coupled with cruelty.

Mr. Huddleston, Q.C., conducted the petition. From his statement and the evidence it appeared that bigamy committed some years previously had been clearly condoned by the wife returning to cohabitation; but the learned counsel submitted that, if necessary, the Court would hold that the subsequent misconduct of the husband had revived the wife's right to rely upon the bigamy as a ground for the decree prayed.

BY THE COURT: We say nothing about the bigamy being revived—that might be a curious question; but quite enough has been proved in this case to found the decree without that.

[*Note.*—But *quære*, whether the principle laid down in *Palmer* v. *Palmer*, *ante*, is not directly applicable.]

1860.
May 30.

THOMAS v. THOMAS.

(*Before the* JUDGE ORDINARY, *on Motion.*)

THOMAS *v.* THOMAS.

Costs.—Service of order and demand.—Attachment.

The Court made an order for the payment of the wife's costs to her proctor in a suit for judicial separation.

A demand for payment of these costs having been personally made on the respondent by a person on behalf of the petitioner's proctor, a receipt for the costs, signed by the proctor, being at the same time shown to the respondent, the Court held such demand for payment to be sufficient to found an order for attachment.

In this case the Court had pronounced a decree of judicial separation on the petition of the wife, and had condemned the respondent in the costs of the suit.

The costs of the suit had been taxed at £82. 16*s.* 10*d.*, and the Court made an order for the payment by the respondent (within one week from the service thereof) of this sum to the petitioner's proctor.

The respondent had been personally served with this order, and a personal demand for payment, which had been omitted to be made at the time of the service, was subsequently made by a person on behalf of the petitioner's proctor, who at the same time showed to the respondent the receipt for the costs signed by the proctor.

Mr. Pritchard moved the Court to decree a writ of attachment against the respondent for nonpayment of the costs.

THE JUDGE ORDINARY: I understand that the steps you have taken are in accordance with the practice of the ecclesiastical courts. I grant the motion.

Pritchard, petitioner's proctor.

1860.
June 2.

CASE
v.
CASE.

(*Before the Full Court,*—THE JUDGE ORDINARY, MARTIN, B., *and* WILLES, J.)

CASE *v.* CASE.

Petition for Dissolution.—Desertion.—Evidence of contents of letters without notice to produce.—Practice.

Where the husband had been served with a citation in England, and had not appeared, the Court refused to decide whether the wife's evidence of the contents of letters written by her to her husband after he had left her was admissible, no notice to produce, etc., having been served; but made its decree on the other evidence given in the case, independently of the supposed contents of the letters.

This was a petition by the wife for dissolution of marriage by reason of the husband's adultery and desertion. The citation had been served on the husband in this country, but he had not appeared.

Dr. Spinks conducted the petition. In course of examining the wife to prove desertion, she stated that she had, after her husband had left her, written to him asking him to return.

WILLES, J., asked whether notice to produce these letters had been served on the respondent, and on this being answered in the negative refused to take down the evidence.

A sister of the petitioner proved that in April 1856 she received a letter from the respondent, asking her to allow his wife to stay with her for a short time, as she was ill and business obliged him to go into the country. She took the petitioner to her house, and for a time the respondent contributed a few shillings a week towards her support. She had since met him in the street and spoken to him about providing

1860. June 2.

CASE v. CASE.

a home for her sister; she asked him where he lived, and he said anywhere, and he slept at the nearest place he happened to be of a night. It was proved that in 1856–57 the respondent had occupied part of a house in Great Portland Street, with the woman with whom the adultery was charged.

When the petitioner's case was concluded,

THE JUDGE ORDINARY: We think the two positions necessary to be established to support this petition are proved, but we think it right to observe that we make the decree quite irrespective of the supposed contents of the letters said to have been written to the husband; we do not determine that we could not take notice of the contents of letters under such circumstances, but there is sufficient evidence in this case without. No service of notice to produce these letters has been made. In some cases petitions are allowed to be proceeded with without service of the citation, or service may have been effected in some distant country, as Australia, and no appearance entered. It might be a denial of justice, under such circumstances, to exclude evidence of the contents of letters. But, as in the present case, the husband was accessible, and there could be no difficulty about serving him, the case is different. The Court pronounces no opinion as to the admissibility of this evidence, but it does not act upon it.

1860.
January 18 and April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

(*Before the full Court,*—THE JUDGE ORDINARY, CHANNELL, B., *and* KEATING, J.)

SIMONIN (falsely called MALLAC) *v.* MALLAC.

Petition for Nullity of Marriage.—Jurisdiction.—Lex domicilii.—Lex loci contractus.

C. and D., being native subjects of France, and then domiciled in that country, came over to London in June 1854, and were married by license according to the law of England, but without the observance of certain formalities and consents required by the law of France in respect of the marriage of its own subjects in foreign countries. C. and D. returned to France, when D., the man, refused to celebrate the marriage according to the French law, and C. instituted a suit for nullity in the French Courts, which D. did not defend, and in December 1854 C. obtained a decree of nullity. C. subsequently came to reside in England, and petitioned for a decree of nullity in this Court; personal service of the citation was effected on D. in Naples, who did not appear.

HELD, first, that D. having entered into a contract in this country, was subject to the jurisdiction of the Courts of this country in respect of the personal status resulting from such contract; secondly, that the personal status resulting from such contract is to be ascertained by the law of this country in which the contract was made, and not any special law of the country of the domicil of the parties to the contract.

This was a petition for a decree of nullity of marriage. The petition was dated the 23rd of December, 1858; the petitioner was therein described as Valérie Josephine Wilhelmine Simonin (falsely called Mallac), of Kingston, in the county of Surrey, spinster. The petition set forth:—

"First, that on or about the 21st of June, 1854, a pre-"tended form or ceremony of marriage was had between your "petitioner and Leon Mallac, of Paris, in the empire of France, "at the parish church of St. Martin-in-the-Fields, in the county "of Middlesex. Secondly, that in about two days after the "said pretended form or ceremony of marriage, your peti-

1860. January 18 and April 26. — SIMONIN (falsely called MALLAC) v. MALLAC.

"tioner and the said Leon Mallac returned to the city of Paris, "but that your petitioner did not cohabit with the said Leon "Mallac, nor was the said pretended form or ceremony of "marriage ever consummated between your petitioner and the "said Leon Mallac. Thirdly, that the said pretended form "or ceremony of marriage was had in contravention to and in "evasion of the law of France regulating the marriage of "native and domiciled French subjects contracted in foreign "countries, and particularly in contravention to and in evasion "of the provisions of articles 170, 63, 148, 151, and 152 of "the Code Civil or Code Napoléon. Fourthly, that your pe- "titioner and the said Leon Mallac are native subjects of "of France, and were at the date of the said pretended form "or ceremony of marriage domiciled in the city of Paris afore- "said; that your petitioner was of about the age of twenty- "two years, and the said Leon Mallac was of or about the age "of twenty-nine years. Fifthly, that on or about the 1st day "of December, 1854, the Civil Tribunal of the First Instance "of the department of the Seine, sitting at Paris aforesaid, "did at a public session of the first chamber of the said tri- "bunal, at the suit of your said petitioner, the said Leon "Mallac having been first duly summoned but not appearing, "declare null and of no effect the pretended marriage of the "21st of June, 1854, between the said Leon Mallac and your "said petitioner, and did condemn the said Leon Mallac in "the costs of the said suit.

"Your petitioner therefore humbly prays that your Lord- "ships will be pleased to decree that the said pretended form "or ceremony of marriage had between the said Leon Mallac "and your said petitioner was and is void and of no effect in "law whatsoever, and that the said Leon Mallac be con- "demned in the costs of the petition," etc.

The citation and copy petition were served personally on Monsieur Mallac at Naples. He put in no answer, and the petition now came on for hearing and proof.

1860.
January 18 and April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

The articles of the Code Civil referred to were as follows:—

Art. 170. "Le mariage contracté en pays étranger entre "Français et entre Français et étrangers, sera valable, s'il a "été célébré dans les formes usitées dans le pays, pourvu qu'il "ait été précédé des publications présentes par l'art. 63, au "titre des actes de l'état civil, et que le Français n'ait point "contravenu aux dispositions contenues au chapitre précé- "dent.

Art. 63. "Avant la célébration du mariage, l'officier de "l'état civil fera deux publications, à huit jours d'intervalle, "un jour de dimanche, devant la porte de la maison commune. "Ces publications, et l'acte qui en sera dressé, énonceront les "prénoms, etc.

"Titre 5me. Du mariage. Chap. 1er. Des qualités et "conditions requises pour pouvoir contracter mariage.

Art. 148. "Le fils qui n'a pas atteint l'âge de vingt-cinq ans "accomplis, la fille qui n'a pas atteint l'âge de vingt-un ans "accomplis, ne peuvent contracter mariage sans le consente- "ment de leurs père et mère.

Art. 151. "Les enfans de famille ayant atteint la majorité "fixée par l'art. 148, sont tenus, avant de contracter mariage, "de demander, par un acte respectueux et formel, le consent "de leur père et de leur mère, etc.

Art. 152. ".Depuis la majorité fixée par l'art. 148 jusqu'à "l'âge de trente ans accomplis pour les fils et jusqu'à l'âge de "vingt-cinq ans accomplis pour les filles, l'acte respectueux "présent par l'art. précédent, et sur lequel il n'y aurait pas "de consentement au mariage, sera renouvelé deux ou trois "fois, de mois en mois; et un mois après le troisième acte, il "pourra être passé outre à la célébration du mariage.

Art. 153. "Après l'âge de trente ans, il pourra être, à défaut "de consentement sur un acte respectueux, passé outre à la "célébration du mariage.

Art. 154. "L'acte respectueux sera notifié à celui ou ceux "des ascendans désignés en l'article 151, par deux notaires ou

1860. January 18 and April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

"par un notaire et deux témoins; et, dans le procès-verbal "qui doit en être dressé, il sera fait mention de la réponse.

Art. 183. "L'action en nullité ne peut plus être intentée "ni par les époux ni par les parens dont le consentement était "requis, toutes les fois que le mariage a été approuvé ex- "pressément ou tacitement par ceux dont le consentement "était nécessaire, ou lorsqu'il s'est écoulé une année sans ré- "clamation de leur part, depuis qu'ils ont eu connaissance du "mariage. Elle ne peut être intentée non plus par l'époux "lorsqu'il s'est écoulé une année sans réclamation de sa part, "depuis qu'il a atteint l'âge compétent pour consentir par "lui-même au mariage."

Dr. Phillimore, Q.C. (with him *Dr. Swabey*) conducted the petitioner's case. The petitioner was examined, and a Monsieur Auguste Noël was called to prove the law of France applicable to the facts of the case; the result of their evidence respectively is stated in the judgment.

Counsel argued, first, that the jurisdiction of the Court was founded,—because the contract as to the effect of which a decision was now sought, was entered into voluntarily by both the petitioner and respondent in this country,—because the petioner was now domiciled in this country and had a right to resort to the only court which could, in the first instance, determine her marriage status. It would be a denial of justice to leave this to be determined, say on an indictment for bigamy or a question of legitimacy, if she were to contract a second marriage here, because the respondent had been duly cited and did not contest the jurisdiction; secondly, if the Court had jurisdiction, it would pronounce a decree of nullity. Admitting that the *lex loci contractûs* generally governs the validity of contracts, these persons were by the law of their domicil under an incapacity to enter into the contract; an incapacity which accompanies them out of their own country especially where the intention was to evade the law of their own country.

1860.
January 18 and April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

They cited on the first point, *Tenducci's Case*, quoted in *Yelverton* v. *Yelverton*, 1 Swab. & Trist. 574; *Scrimshire* v. *Scrimshire*, 2 Cons. 395; *Jeffreys* v. *Boosey*, 4 H. L. Cas. 955; *Conelly* v. *Conelly*, 7 Moore, P. C. C. 138; *Robins and Paxton* v. *Dolphin*, 1 Swab. & Trist. 537; *Munro* v. *Munro*, 7 Cl. & F. 842; *Dalrymple* v. *Dalrymple*, 2 Consist. 54; *Brook* v. *Brook*, 2 Sm. & G. 481; *Butler v. Dolbin*, 2 Lee, 317; Donellus, lib. 7, C. 12, 14; Story's Conflict, ss. 539, 542; Daniell's Practice of Ct. of Chancery, s. 6.

On the second point, 1 Burge, 190–4.

Fælix, Troité du Droit International, vol. ii. c. 2, p. 380; *Ibid.* tit. ii. c. 2, s. 3; Merlin, Répertoire, art. 'Loi,' sec. 6, num. 6; *ibid.* art. "Mariage, Question de Droit, Publication de Mariage," vol. x. p. 12; Savigny, vol. viii. p. 359; Pothier, Traité de Mariage, pt. iv. c. 1, n. 363; Fælix, Mariage Contracté en Pays Etranger, vol. i. sec. 33; *Harford* v. *Morris*, 2 Consist. 437; *Robinson* v. *Blunt*, 2 Burr. 1079; *Compton* v. *Bearcroft*, quoted 2 Consist. 444. *Cur. adv. vult.*

April 26.

THE JUDGE ORDINARY: This was a petition for a decree of nullity of marriage. [The learned Judge Ordinary here read the substance of the petition.] Leon Mallac was served at Naples with a citation out of this Court, and a copy of the petition, but did not appear. The case came on for hearing before my brothers Channell and Keating and myself, on the 18th of January, 1860, when the petitioner proved that she was of French origin, and in 1853 was residing in Paris with her mother, her father being then dead. In that year she became acquainted with Leon Mallac, also of French origin, who made her an offer of marriage, which she accepted. In June 1854 he proposed that they should come to England and be married in this country, assigning as a reason that if that were done his father would afterwards consent, and he would then marry her in France. The parties came to London, and were married in due form by licence on the 21st of June,

1860. April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

1854, in the parish church of St. Martin-in-the-Fields. Leon Mallac was then of the age of twenty-nine years, and the petitioner twenty-two. The marriage was not consummated, and the parties returned to Paris the next day, and went to the residence of the petitioner's mother, Leon Mallac occupying another part of the same building. The petitioner asked him to marry her in France; he did not do so, but said he would go to his own country and ask the consent of his father, who lived on the banks of the Garonne. He afterwards wrote to her a letter, refusing to marry in France, and admitting that he had broken his word. The petitioner then instituted a suit before the Civil Tribunal of the First Instance of the Seine to procure a decree of nullity of the pretended marriage; and on the 1st of December, 1854, a decree was made, of which the original and a translation were put in evidence. The grounds on which that decree was made are stated in the following words in the translation:—"The Court decides by de-"fault against Leon Mallac, who did not appear, nor any one "for him, although duly called as follows: Considering in "law that, by the words of art. 170 of the Code Napoléon, "when a marriage between French subjects had been cele-"brated in foreign countries, it must have been preceded by "publication in France prescribed by the law, and that there "must not have been any contravention (infringement) of the "provisions of articles 144 and following of the Code Napo-"léon; considering that the nullity provided for by art. 170 "is not absolute, but ought to be pronounced when an omis-"sion of formalities has taken place with the formal inten-"tion to elude the law, it being in the province of the tribunal "to appreciate the circumstances thereof; considering in fact "that Leon Mallac and Valérie Simonin, artist of the Théâtre "Français, both being French subjects, and domiciled in Paris, "have contracted marriage in London, on the 22nd of June, "1854, before a minister of the Protestant Church, in the pre-"sence of witnesses; considering that this marriage was cele-

1860.
April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

"brated without the parties having obtained or sought the "consent of their parents, and without having been preceded "in France by the publications prescribed by art. 63 of the "Code Napoléon; considering that the married couple having "resided in Paris, only went momentarily to England for the "purpose of contracting marriage there, and returned to "France directly after the celebration; considering that from "this it is evident that they acted in this manner with the "formal intention of evading the prescriptions of the French "law; considering that Valérie Simonin states distinctly that "this marriage was not followed by any consummation or co-"habitation between the parties, and that the assertion is not "contradicted by Leon Mallac, who did not appear, but al-"lowed the demand for nullity presented by her to go by de-"fault; considering that under these circumstances the mar-"riage contracted in London on the 22nd of June, 1854, be-"tween Leon Mallac and Valérie Simonin, cannot be recog-"nized as valid and regular; on these grounds it declares the "pretended marriage of 22nd of June, 1854, between Leon "Mallac and Valérie Simonin for null and void," etc.

In the month of May, 1857, the petitioner and her mother came to England, and have resided here from that time, and she stated that she had no intention to return to France, and had no property there. A witness, Auguste Noël, called to prove the law of France as applicable to the case, stated that he had acted as a notary public in Paris, and in order to do so it was necessary that he should be acquainted with the law of marriage in France. He deposed that art. 63 of the Code Napoléon as to publication of banns of marriage is part of the existing law of France, and was so in 1854; that article 170 and articles 151, 2, 3, and 4, are part of the law of France, and were so in 1854; that those articles do not prohibit the marriage, but only postpone it, and if the form prescribed is followed, and the time prescribed has elapsed, the parties may marry without consent; that a marriage in a foreign land as

1860. April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

mentioned in art. 170, without attention to the articles 144 and 164 therein referred to, is good or bad according as the French tribunal before whom the question is raised may think the parties went abroad to marry in fraud of the law of France or not; that if a Frenchman was married here in England without consent, and consent afterwards given in France, that would render the marriage valid, whatever were the formalities omitted; that art. 184 of the Code is part of the law of France, and was so in 1854; that the prescription therein mentioned would run in the case of a daughter from the age of twenty-one, and of a son from the age of twenty-five; that if a daughter between the ages of twenty-one and twenty-five allows a year to elapse without impeaching the marriage, this is a statute of Limitations, and she cannot impeach it afterwards.

This state of facts presented two very important questions for our consideration: first, whether the Court has any jurisdiction over Leon Mallac, the party cited; and, secondly, assuming that such jurisdiction exists, whether, according to the law of this country, the marriage solemnized is to be held null and void. We had the advantage of a learned argument on the part of the petitioner, and feel that the responsibility cast upon the Court is greatly increased by the want of any such assistance on the other side. The argument in favour of the jurisdiction was rested on the ground, first, that the contract was made in England, and that the Court is called upon for its decision with regard to the effect of a civil and religious English contract, celebrated under an English statute, 4 Geo. IV. c. 76, and that the tribunals *loci contractûs* have, generally speaking, cognisance of the contract; secondly, that England is now the domicil of the petitioner, but that objection begs the main question in dispute, for if the marriage be valid it is not her domicil; thirdly, that the respondent was personally served with the citation and petition, and has not appeared to contest the jurisdiction of the Court.

1860.
April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

The 42nd section of the statute 20 & 21 Vict. c. 85, by which this Court was established, removes all objection on the ground of the citation having been served without her Majesty's dominions, but in our opinion would not of itself suffice to give to the Court authority to decide upon the rights of a party not otherwise subject to its jurisdiction. This question therefore depends upon the first proposition, that the parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal. Huber, 65, tit. 1, De Foro Competente, s. 5, says, "Sequitur causa fori "tertia quam rem gestam esse diximus eamque vel è contractu "vel è delicto admisso." In another place he adds, "Si reus "illic haberi posse," etc. The same doctrine is to be found in John Voet, Boullenois, Donellus, and Story. The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 19, which allows a writ of summons to be issued against a person residing out of the jurisdiction, and not being a British subject, and proceedings to be had thereon, notice of such writ having been served on the party, appears to have been founded on this principle; and sect. 42 of the 20 & 21 Vict. c. 85, already adverted to, removes all difficulty as to service of process, although the party cited is a foreigner by origin and domicil. There is nothing contrary to natural justice in calling upon him to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where it was entered into by him; for, according to Lord Stowell, in *Dalrymple* and *Dalrymple*, 2 Cons. 61, it is an indisputable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party.

We think, therefore, that this Court is competent to enter-

1860.
April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

tain the present suit, and to adjudicate upon the petition presented by the party calling herself Valérie Simonin, which prays the Court to decree that the pretended form or ceremony of marriage had between the petitioner and Leon Mallac was and is void, and of no effect in law whatsoever.

This, which is the second question to be determined, is no doubt of the gravest importance, and, as far as this Court has been able to ascertain, *primæ impressionis*. No decision on the point was cited to us by the learned advocate for the petitioner, and we have not had the benefit of any other diligence save our own in the attempt to discover precedents for our guidance. The question is this—whether a marriage duly solemnized in England in the manner prescribed by the law of England, between parties of full age and capable of contracting according to that law, is to be held null and void because the parties to that marriage, being foreigners, contracted it in England in order to evade the laws of the country to which they belonged and in which they were domiciled. It may indeed be doubted whether the evidence of the petitioner established the intention to evade the law of France, and whether that which the witness Auguste Noël called a statute of limitation, viz. sect. 183 of the Code Napoléon, did or did not operate to bar the right of the petitioner to institute this proceeding four years after the marriage was solemnized; but we pass over those points in order to deal with the broad and important question that has been raised. It was contended that, the parties being French, the law of that country affixed to them an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity was a personal *status* which travelled with them everywhere, and rendered them incapable of making a valid contract in any other country. But, according to the evidence, such incapacity to contract was not absolute but conditional only, and a contract made by them would be good unless they came here with the intention to evade the law of France. So a con-

1860.
April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

tract made here would be unimpeachable if ratified by the subsequent assent of the parents; and a contract made here would be perfectly valid unless impeached within a certain time, and therefore a marriage contracted between a man and woman of the respective ages of twenty-five and twenty-two, without attending to the formalities prescribed by the Code Napoléon, arts. 151, 152, 153, and 154, may receive a different consideration from one absolutely prohibited by art. 148, by parties respectively under those ages. But taking the decree of the French Court, in the suit there instituted, as evidence that by the law of France this marriage was void, we again come to the broad question, is it to be judged of here by the law of England or the law of France? In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such rule does not extend to contracts of marriage; and that parties are, with reference to them, bound by the law of their domicil. This question, of so much importance in all civilized communities, has been largely discussed by jurists of all nations, but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute, and of which the parties were domiciled subjects. That a marriage, good by the law of the country where solemnized, should be held good in all other countries, and the converse, is strongly maintained as a general rule by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions, viz. marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy, *ex. gr.* by our Royal Marriage Act. Story, on the Conflict of Laws, s. 113 a, mentions a third exception: "Those celebrated in foreign countries by "subjects entitling themselves under special circumstances to "the benefit of the laws of their own country." In several

1860.
April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

instances, learned Judges presiding in our Ecclesiastical Courts have stated the general rule, without mentioning the exceptions, whence it has sometimes been contended that they meant to controvert their existence. But, inasmuch as none of the cases referred to fell within the exceptions above-mentioned, it cannot justly be inferred that those learned persons intended their words to bear so extensive a meaning; for they would hardly have repudiated the doctrine of several learned writers, whose works are always received as worthy of great attention, without condescending to advert to it in terms, and assigning some reasons for dissenting from it.

In addition to the writings of jurists as to the existence of such a general rule by the law of all civilized nations, we find that in several cases it has been adopted by the Courts of this country as the ground of their decisions.

I believe the earliest of them was *Scrimshire* v. *Scrimshire*, decided by Sir E. Simpson in 1752, and reported 2 Cons. 395, for that learned judge then said it was a case *primæ impressionis*. The judgment is of great value, from the full manner in which he dealt with the principles on which the Court should proceed in adjudicating upon such cases. The parties were British subjects, domiciled in England; it was a suit for restitution of conjugal rights. The respondent pleaded that the marriage was celebrated in France, set forth circumstances under which that celebration took place, and averred that by the laws of France the marriage was null and void. Sir E. Simpson, after disposing of one or two preliminary points, observed: "The general questions are two: first, "whether there be full and legal proof that the parties did "mutually, freely, and voluntarily celebrate marriage in such "manner as the laws of this country would deem to constitute "marriage, if there was nothing else in the case but a ques-"tion on the fact of the marriage: secondly, whether, if the "fact of the marriage should be proved, this marriage can by "the laws of this country be effectuated and pronounced to

"be good, being solemnized in France, where by law it is null "and void, to all intents and purposes? For it seemed to be "admitted in the argument that the rule was so, but insisted "that it ought not to be a rule of determination in this cause." The first point he determined in the affirmative, and would have held the marriage valid had it been agreeable to the laws of France, where it was celebrated. "But," he proceeds, "the great difficulty arises on the second question, from the "marriage being celebrated in France, where such marriage "is null by the laws of France." He afterwards says: "The "only question before me is, whether this is a good or bad "marriage by the laws of England; and I am inclined to "think that it is not good. On this point I apprehend that "it is the law of this country to take notice of the laws of "France, or of any foreign country, in determining upon mar-"riages of this kind. The question being in substance this— "whether, by the law of this country, marriage contracts are "not to be deemed good or bad according to the laws of the "country in which they are formed, and whether they are not "to be construed by that law." He then quotes several passages from Sanchez, J. Voet, and others, showing that if subjects of a country where clandestine marriages are prohibited go to another country where there is no such prohibition, and celebrate a clandestine marriage there, it is to be held good; and the converse is established by the same authorities. He sums up the effect of the books referred to in these words: "These authorities fully show that all contracts are to be con-"sidered according to the laws of the country where they are "made, and the practice of civilized countries has been con-"formable to this doctrine, and by the common consent of "nations has been so received."

In many instances judges have used similar language with reference to cases where the form and ceremonial of the marriage were alone in question; and it can hardly, in such cases, be presumed that they intended their words to bear a more

1860. April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

extensive sense than was necessary for the question then before them; but the sense ascribed by Sir E. Simpson to these passages extends to the clandestine character of the marriage, and not merely to the form of the contract or ceremonial. He then explains, in the clearest manner, the principle on which Courts have proceeded in holding that marriages are to be considered according to the law of the country in which they are celebrated. "All nations allow marriage contracts; they "are *juris gentium*, and the subjects of all nations are equally "concerned in them; and from the infinite mischief and con- "fusion which must necessarily arise to the subjects of all "nations with respect to legitimacy, successions, and other "rights, if the respective laws of different countries were only "to be observed as to marriages contracted by the subjects of "those countries abroad, all nations have consented, or must "be presumed to consent, for the common benefit and advan- "tage, that such marriages should be good or not according to "the laws of the country where they are made. It is of equal "consequence to all that one rule in these cases should be ob- "served by all countries, that is, the law where the contract "is made. By observing this law no inconvenience can arise, "but infinite mischief will ensue if it is not." The same rule was recognized and made the ground of the judgment of Sir W. Wynne, in *Middleton* v. *Janverin*, 2 Cons. 437; nor is their reasoning weakened by the fact that certain exceptions out of that rule have been generally recognized, viz. where marriages deemed contrary to the law of religion and morality, and contrary to the settled policy of a nation, have been contracted abroad and held void in the country of which the parties were domiciled subjects, and where such a marriage would not be allowed.

It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of

1860.
April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

a country where a marriage has been solemnized in conformity with the laws of that country should hold it void because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced, even in the case of marriages deemed to be incestuous. There is a passage in Huber, Prælectiones Juris Civilis, lib. 1, tit. 3, 'De Conflictu Legum,' on this subject, which ought to be noticed. After discussing contracts made in foreign countries, in sect. 8, he proceeds: "Matrimonium pertinet etiam ad has regulas, si licitum est "eo loco ubi contractum et celebratum est, ubique validum "erit affectumque habebit, sub eâdem exceptione prejudicii "aliis non creandi, cui licet addere si exempli nimis sit abo- "minandi, ut si incestum juris gentium in secundo gradu con- "tingeret alicubi esse permissum; quod vix est ut usu veniri "possit;" and he proceeds to say, that if parties go to a country where such a marriage is tolerated, and celebrate it there, and return to their own country, it will not be recognized: "Quia sic jus nostrum pessimis exemplis eluderetur, "eoque pertinet hæc observatio; sæpe fit ut adolescentes sub "curatoribus agentes, furtivos amores nuptiis conglutinare "cupientes, abeant in Frisiam Orientalem aliave loca in quibus "curatorum consensus ad matrimonium non requiritur juxta "leges Romanas, quæ apud nos hâc parte cessant. Celebrant "ibi matrimonium et mox redeunt in patriam. Ego ita exis- "timo hanc rem manifeste pertinere ad eversionem juris nostri, "ac ideo non esse magistratus hic obligatos è jure gentium "ejusmodi nuptias agnoscere et ratas habere; multoque magis "statuendum est eos contra jus gentium facere videri qui ci- "vibus alieni imperii suâ facilitate jus patriis legibus contra- "rium scientes volentes impertiuntur."

Now this passage is remarkable. Huber discusses the two exceptions out of the general rule, that marriages good where celebrated are by the law of nations to be acknowledged everywhere,—incestuous marriages and marriages of minors without

1860.
April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

consent (*curatorum*), celebrated in countries whither they have gone for the purpose of evading the laws of the country of their domicil,—and he does not suggest the slightest doubt as to either class being held good in the country where solemnized; but, with reference to the second class, vindicates the country of the domicil against the charge of violating the laws of nations by refusing to recognize them. Story is, I believe, the only writer who has expressed an opinion on this point, and he, after mentioning that France has ventured on the doctrine that the marriages of Frenchmen under such circumstances shall not be deemed valid, adds: "There can be little "doubt that foreign countries where such marriages are cele- "brated will follow their own law, and disregard that of "France" (Conf. of Laws, sect. 90). The question appears to have occurred to Lord Meadowbank, a judge of great eminence; for in the note of his opinion annexed to his interlocutor of remit, in the case of *Gordon* v. *Pye*, Fergusson's Consist. R. p. 361, he puts this question: "Or would a marriage "here be declared void because the parties were domiciled in "England, and minors when they married here, and of course "incapable by the law of their country of contracting mar- "riage?" plainly intimating his own opinion that it would not.

In this country marriages have been solemnly recognized as valid, although celebrated in Scotland between English domiciled minors without the consent required by the Marriage Act, 26 Geo. II., to which country they had resorted for the purpose of evading the operation of that Act. I allude to the case of *Compton* v. *Bearcroft*, in a note to the report of *Middleton* v. *Janverin*, 2 Cons. 444. The libel in that case is set out, in which the minority of the lady, the want of consent, the English domicil, and the Marriage Act were pleaded, and it was alleged that the parties were married in Dumfries merely to evade the laws of this country, and returned to England the same day. The prayer was "that the marriage might be

"declared null and void, pursuant to the said Act for clandes-"tine marriages." The libel was rejected; the Court therefore must have held, that if all the matters alleged were proved, they would not supply a ground for declaring the marriage null.

It has been said that the parties did not in that case evade the Marriage Act, for that it contains an express exception of marriages solemnized in Scotland. It is true that marriages of minors in Scotland without consent are not prohibited by the Marriage Act, and therefore they cannot be said to be contrary to the law of England; but there can be no doubt that the parties went to Scotland to evade the operation of the law which was established in England. *Compton* v. *Bearcroft* is therefore an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England.

The French tribunal in this case appears to have held the marriage null and void, not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law.

Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right, it must be found in the law of nations, that law "to which all nations have consented, or to which they must "be presumed to consent, for the common benefit and advan-

1860. April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

"tage." Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now the law of France is equally stringent whether both parties are French, or one only. Assume then that a French subject comes to England, and there marries, without consent, a subject of another foreign country, by the laws of which such a marriage would be valid, which law is to prevail? to which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English: would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? But it may be said that in the case now before the Court both parties are French, and therefore no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognized, it must be followed out to all its consequences; the cases put are, therefore, a fair test as to the possibility of maintaining that by any *comitas* or *jus gentium* this Court is bound to adopt the law of France as its guide. Huber, indeed, in the passage cited, after vindicating the refusal to acknowledge a marriage solemnized abroad between parties who have gone there to evade the laws of their own country, proceeds: "Multoque magis statuendum est eos "contra jus gentium facere videri qui civibus alieni imperii "suâ facilitate jus patriis legibus contrarium scientes volentes "impertiuntur."

It is somewhat difficult to ascertain what Huber would re-

1860.
April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

quire to be done by foreigners in order that they may be exempted from his reproach. He assumes that they are *scientes*. Is it intended that they are to inquire and ascertain whether the law of any foreign nation will be evaded if the proposed marriage is solemnized? Is the domicil of the parties and the law prevailing there to be investigated? Are the parties to be called upon to prove their ages, consent of certain relations, or the non-existence of certain relations? or that they have not come to this country to evade the laws of their own? Are the clergy of this country to be deemed *scientes* that a foreign law is about to be evaded unless they have proof to the contrary? Unless that proposition can be established, the reproach of violating the law of nations cannot attach to this country if such marriages are here celebrated.

The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnized shall in that country at least decide whether it is valid or invalid; the absence of any judicial decision or *dictum*, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects.

France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but England also may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other, and if either is guilty of any breach of the *comitas* or *jus gentium*, that reproach should attach to the nation whose laws are least calculated to ensure the common benefit and advantage of all. For these reasons we feel bound to dismiss this petition.

It may be unfortunate for the petitioner that she should be held a wife in England and not so in France. If she had re-

1860. April 26.

SIMONIN (falsely called MALLAC) v. MALLAC.

mained in her own country, she might have enjoyed there the freedom conferred upon her by a French tribunal; having elected England as her residence, she must be contented to take English law as she finds it, and to be treated as bound by the contract which she there made. The novelty and importance of the question has cast upon the Court much anxiety, but from some portion of it we are relieved by the consideration that, if our judgment is wrong, it may be corrected by the highest tribunal in this country.

1860. May 31.

BACON v. BACON AND BACON.

(*Before the Full Court*,—THE JUDGE ORDINARY, MARTIN, B., *and* WILLES, J.)

BACON *v.* BACON AND BACON.

Dissolution of Marriage.—Settlement of Wife's Property.—20 & 21 *Vict. c.* 85, *s.* 45.—*Costs.*

On a decree of dissolution by reason of the wife's adultery, the Court directed two-thirds of the bulk of certain property to which she was entitled under certain trusts, to be settled on the children immediately, and the remaining third after her death.

This was originally a petition for dissolution of the marriage at the suit of the husband by reason of the wife's adultery. Certain issues raised by the pleadings were, on the 28th of November, 1859 (before the Judge Ordinary, Watson and Hill, JJ.), determined by the verdict of a jury in favour of the petitioner, and the decree suspended to enable the petitioner to make an application for the settlement of the wife's property under the 45th section of 20 & 21 Vict. c. 85.

Dr. Spinks (*Mr. G. Francis* with him).—Under the trusts of certain wills, it appeared that when certain mortgages were

paid off, the respondent would be in receipt of one-sixth of an income of upwards of £600 arising out of real property, with power to dispose thereof: she was also entitled to £15 per annum from another source.

Petitioner's counsel asked for a settlement of the property on the children of the marriage, two sons and a daughter, of the respective ages of nine, seven, and five years, leaving the respondent a proportion for her maintenance during life, or whilst unmarried.

Dr. Phillimore, Q.C. for the respondent, consented to such arrangement as the Court might think fit.

BY THE COURT: We are of opinion that the following will be a reasonable arrangement as regards the property:—The £15 we do not touch. As to the property under the will, over which, when the marriage is dissolved, the respondent would have absolute control, we think that she ought not to have any controlling power after her life; that two-thirds should be settled on the children immediately, and the remaining third on them after the mother's death. The 45th section does not point out any mode in which the directions of the Court are to be carried out. With respect to permanent alimony, the 32nd section enables the Court to have a deed settled by a conveyancing counsel, and executed by the parties; but we have no such power in the present case; if we had, we should undoubtedly think it reasonable that the father should be joined with the other trustees to protect the interests of the children.

1860.
June 5.

BURT v. BURT.

(*Before the Full Court,*—THE JUDGE ORDINARY, MARTIN, B., *and* WILLES, J.)

BURT *v.* BURT.

Bigamy and Adultery.—Evidence.

To establish bigamy as a ground for the sentence of the Court, there must be proof of such a ceremony as, but for the former marriage, would constitute a valid marriage. Thus, if the bigamy relied upon took place abroad, it will be necessary to give formal proof of the marriage law of that country.

This was a petition for dissolution of marriage, at the suit of the wife, by reason of bigamy, adultery, and desertion. The respondent made no answer.

Dr. Spinks conducted the petition.

It appeared that the husband had left the wife in England, and had married another woman in Australia. This woman was produced as a witness, and said that she had married a person of the name of Burt at Melbourne, according to the form of the Kirk of Scotland; that she had lived nine years there, and had known many persons married there in the same form, who afterwards lived together as husband and wife. A certificate of the marriage was also put in, but there was no formal proof of the marriage law of Australia.

BY THE COURT: We cannot in this case consider the bigamy as proved. There must be proof of such a ceremony as, but for the former marriage, would have constituted a valid marriage. In the absence of the formal proof of the law of Australia, we cannot say that this is the case. But, without putting our decree on the ground of bigamy, we think that Burt's cohabitation with the woman with whom he went

through the ceremony described, and his desertion of his wife, are sufficiently established to warrant a decree of dissolution.

1860.
June 5.

BURT *v.* BURT.

(*Before the Full Court,*—THE JUDGE ORDINARY, MARTIN, B., *and* WILLES, J.)

May 31.

THOMAS v. THOMAS.

THOMAS *v.* THOMAS.

Marriage Settlement.—No Children of Marriage.—Jurisdiction of Court under s. 5 *of* 22 *&* 23 *Vict. c.* 61.

Where there is a marriage settlement and there are no children of the marriage, the Court has not jurisdiction on a dissolution of the marriage to make an order under sect. 5 of 22 and 23 Vict. c. 61, with reference to the application of the settled property.

This was a suit for a dissolution of marriage promoted by the wife against her husband. The Court was of opinion that the wife was entitled to a decree, dissolving the marriage, on the ground of her husband's adultery, coupled with cruelty.

Dr. Phillimore, Q.C. (*Dr. Tristram* with him) asked the Court to suspend the decree, in order to enable the petitioner to present a petition for permanent alimony, unless the Court should be of opinion that it could deal with the property comprised in the marriage-settlement under s. 5 of 22 & 23 Vict. c. 61. The settlement included property belonging to both the husband and the wife. The husband under it took the first life-interest in the wife's property, and it contained no provision for the wife during his life. There were no issue of the marriage, and as by the words of s. 5 the Court was only

1860. May 31.

THOMAS v. THOMAS.

authorized "to make such order with reference to the applica- "tion of the whole or a portion of the property settled either "for the benefit of the children of the marriage, or of their re- "spective parents as to the Court should seem fit," it might be a question whether the use of the term "parents" did not exclude from the operation of this section a case where there were no children of the marriage. There was, however, no apparent reason for such exclusion.

BY THE COURT: We think we have no power by the terms of this section to deal with the settlement in this case. We suspend the decree to enable the petitioner to make an application for permanent alimony.

Attorneys for the petitioner, *Davies, Son, Campbell, and Reeve.*

July 2.

DECK v. DECK.

(*Before the Full Court,*—THE JUDGE ORDINARY, MARTIN, B., *and* WILLES, J.)

DECK *v.* DECK.

Petition by wife for Dissolution.—Domicil of Husband at date of service of citation.—Jurisdiction.

D., a natural-born English subject, married C., an Englishwoman, in England; he afterwards left her, acquired a domicil in the United States, North America, and intermarried there with E.

C. petitioned for dissolution. The Court took time to consider whether its jurisdiction, under the circumstances, was founded; and

HELD, first, that C., being a native-born Englishwoman, was entitled, under the 27th section of the Divorce Act, to present her petition; secondly, that D., being a natural-born English subject, could not

shake off his liability to the authority of the laws of his native country, and pronounced for the jurisdiction. 1860. July 2.

DECK v. DECK.

This was a petition for dissolution of marriage at the suit of the wife, by reason of husband's adultery and bigamy. The citation was served upon the respondent in the United States, North America.

The petitioner's case was conducted by *Mr. O'Malley*, Q.C., and *Mr. D. Keene*. May 28.

On the evidence it appeared that the husband, a natural-born English subject, was, at the time of the service of the citation, domiciled in the United States, North America; and the Court took time to consider how this fact affected its jurisdiction. The circumstances are sufficiently stated in the following judgment of the Court.

THE JUDGE ORDINARY: This was a petition for dissolution of marriage by reason of bigamy and adultery alleged to have been committed by the respondent. It appeared in evidence before us that the parties were married at Norwich in 1844. In 1848 a deed of separation was executed, and they ceased to live together. Soon afterwards the respondent went to America and became domiciled there. In 1853 he intermarried in America with Louisa Halpin, and by her had one child. She afterwards in the Supreme Court of the State of New York obtained a decree of nullity of marriage, on the ground of his having a wife living at the time when the marriage ceremony was performed. The citation out of this Court was served on the respondent personally in America. On this evidence it was quite clear that the respondent had been guilty of bigamy and adultery, but a doubt was entertained whether the Court had jurisdiction to adjudicate on a petition presented against a party domiciled in America. We July 2.

1860. July 2.

DECK v. DECK.

have considered the question, and are of opinion that we have jurisdiction. Both parties were natural-born English subjects; both, therefore, owed allegiance to the crown of England, and obedience to the laws of England; that allegiance could not be shaken off by change of domicil; the husband, therefore, although he became domiciled in America, continued liable to be affected by the laws of his native country. In Story's 'Conflict of Laws,' s. 540, it is said:—"It is true "that nations generally assert a claim to regulate the rights, "duties, obligations, and acts of their own citizens, wherever "they may be domiciled; and so far as those rights, duties, "obligations and acts afterwards come under the cognizance "of the tribunals of the sovereign power of their own coun- "try, either for enforcement or protection, or for remedy, "there may be no just ground to exclude their claim." In that opinion we concur. Now the Imperial Parliament has, by statute 20 & 21 Vict. c. 85, regulated the rights, duties, obligations and acts with regard to matrimonial causes in England. And by s. 27 it was enacted, "That it shall be "lawful for any wife" (which we think must certainly include any wife being an English natural-born subject) "to present a "petition to this Court praying that her marriage may be dis- "solved, on the ground that since the celebration thereof her "husband has been guilty of bigamy with adultery, and that "bigamy shall be taken to mean the marriage of any person "being married to any other person during the life of the "former husband or wife, whether the second marriage shall "have taken place within the dominions of her Majesty or "elsewhere." In this case, then, we have before us the petition of an English wife against an English husband, complaining that he has, since the celebration of her marriage with him, been guilty of bigamy and adultery in America; the case seems to come within the letter as well as the spirit of the enactment, and s. 42 removes all difficulty as to the service of process out of this country. Having then jurisdic-

tion, and the petitioner's case having been proved, we are bound to exercise that jurisdiction, and accordingly pronounce our decree for the dissolution of the marriage, and condemn the respondent in costs. 1860. July 2. DECK v. DECK.

(*Before the Full Court,*—THE JUDGE ORDINARY, MARTIN, B., *and* WILLES, J.) May 28 and July 2.

BOND *v.* BOND. BOND v. BOND.

Petition by Wife for Dissolution.—Domicil of Husband.—Jurisdiction.

C., a natural-born Englishwoman, married B. in England, and lived with him partly in England partly in Ireland; in the latter country they stayed on one occasion with B.'s father, on another at a house which B. himself was occupying. Cruelty was proved both in England and Ireland; adultery in Ireland. The citation was served on B. in England, where he was then living; he did not appear. The Court took time to consider whether its jurisdiction was, under the circumstances, founded, and

HELD, that C. was entitled to present her petition, and that it did not so distinctly appear on the evidence that B.'s domicil was Irish as to oblige the Court to consider whether its jurisdiction over a foreigner could be maintained, and pronounced for the jurisdiction.

SEMBLE, if a foreigner appears to a citation otherwise than under protest, he submits himself to the jurisdiction of the Court.

This was a petition for a dissolution of marriage at the suit of the wife, by reason of the husband's adultery and cruelty. There was no appearance on the part of the respondent. The petitioner's case was conducted by

Mr. Serjt. Pigott and *Dr. Spinks.*

On the evidence a question arose as to the jurisdiction of the Court, on the supposition that the domicil of origin of the

1860. May 28 and July 2.

BOND v. BOND.

respondent was Irish, and the Court took time to consider how far this might affect its jurisdiction. The circumstances of the case are sufficiently stated in the following judgment of the Court.

July 2.

THE JUDGE ORDINARY: This was a petition for dissolution of marriage by Charlotte Bond, on the ground of the adultery and cruelty of her husband. The petitioner was an Englishwoman. On the 28th of July, 1840, she was married to the respondent, in England; they then went to live at Clifton, from thence they went to Ireland, to the house of the respondent's father; not long afterwards they returned to England and lived some time in London. In 1843 they were at the house of a sister of the petitioner, in Warwickshire, where she was treated with great cruelty by the respondent. They afterwards again went to Ireland, but returned to England in 1845, bringing with them a servant named Hegan; this woman shortly afterwards returned to Ireland, and the respondent went there also. In the same year the petitioner went to Ireland to her husband, who was then living at a place called Grange Hall. Soon after her arrival she found that the respondent was living in open adultery with Mary Ann Hegan; she was there again treated with great cruelty by the respondent, and shortly after returned to England to her friends. She has not since seen her husband, nor did she hear from him until 1860, when he was living in England, where he was served with the petition. According to this evidence the petitioner was English, and therefore had a right, according to the 27th section of the Divorce Act, to present her petition; but the respondent appears to have had a residence in Ireland, from which, if that evidence stood alone, it might be inferred that his origin was Irish, and Ireland, for the purpose of this question, must be treated as a foreign country. If the evidence on this point had been so cogent as to compel the Court to take notice that the respondent was not English, we must

have decided whether or no the Court can, consistently with the principles of international law, assume a right to adjudicate on a petition presented against a foreigner who is served abroad with a citation, to which he does not appear. But the marriage was solemnized in England, and the respondent afterwards lived with his wife at various places in England, and although he has not appeared and submitted to the jurisdiction of this Court, he has not contested it, and we do not find evidence of so conclusive a nature as to compel us to deal with him as an Irishman; the case is therefore the same in substance as *Deck* v. *Deck*, and our decree is that the marriage be dissolved and the respondent condemned in costs.

1860. July 2.

BOND *v.* BOND.

(*Before the Full Court*,—THE JUDGE ORDINARY, *etc.*)

April 30.

ALEXANDER *v.* ALEXANDER AND AMOS.

ALEXANDER v. ALEXANDER AND AMOS.

Dissolution of Marriage.—Adjournment of hearing.—Leave to Wife to appear.—Proof of Adultery.—Evidence.

Where a wife had been deterred from putting in an appearance to a petition filed by her husband charging her with adultery, in consequence of a threat made by her husband's agent, the Court (the case having been adjourned) gave her leave to appear and file an answer.

The case on coming on for re-hearing (the wife having filed an answer), was treated as a new and not as an adjourned case.

QUÆRE, whether, when a case, which has been adjourned, comes on for further hearing, the petitioner is entitled to examine any of the witnesses whom he had examined at the former hearing.

Where a wife has conducted herself during a married life of twenty years with propriety, the Court will not conclude that she has been guilty of adultery charged to have been committed without the slightest regard for decency or fear of detection, unless established by cogent evidence.

This was a petition for dissolution of marriage, on the ground of the wife's adultery.

1860.
April 30.

ALEXANDER
v.
ALEXANDER
AND AMOS.

The petitioner, Mr. Samuel Alexander, son of a banker at Ipswich, married the respondent (then a Miss Milborne) in January 1838. The respondent was a person of humble origin, and of little or no education, and the marriage did not meet with the approval of the petitioner's family. They had cohabited from the date of their marriage up to September 1858, and they had issue of the marriage four children. It was admitted by the petitioner's brother, that his family had endeavoured to induce the respondent to sign a deed of separation six years ago, and that a similar attempt had been unsuccessfully renewed shortly before the petition was filed. The respondent was charged with having committed adultery with Frank Amos, the co-respondent, a groom in the husband's employment.

November 19. The petition was heard before the full Court.

Mr. Maude and *Mr. Beck* appeared for the petitioner.

The respondent had not entered an appearance.

Two witnesses were examined in support of the charge of adultery, Patrick Sullivan, a farm labourer, and Eliza Vallens, who had both been in the petitioner's service.

Mr. Maude submitted that the charge in the petition was established. If the Court was not satisfied with the evidence, he should ask it to adjourn the case.

THE JUDGE ORDINARY (after consultation): The Court has been deliberating upon the evidence which has been laid before it. It is of a very singular character. The Court is not prepared upon that evidence to pronounce a decree dissolving the marriage. The case may be adjourned for further evidence.

A sister of the respondent, who had been called to prove her

handwriting, stated that Mrs. Alexander denied the charge of adultery; that she had only been prevented from opposing the suit in consequence of a threat made by the petitioner's agent, and that she was ready and anxious, if permitted, to appear and defend the suit.

1859. November 19.

ALEXANDER v. ALEXANDER AND AMOS.

THE JUDGE ORDINARY: This application is made irregularly. The Court cannot entertain it at present. But if Mrs. Alexander should hereafter make a formal application to the Court for leave to appear and defend herself, I am not prepared to say that the Court would not, upon sufficient grounds shown, grant her application.

Mr. Couch moved (before the Judge Ordinary) for a rule *nisi*, calling upon the petitioner to show cause why the respondent should not be allowed to put in an appearance and file an answer to the petition. The motion was supported by an affidavit of the respondent, in which she denied the charge of adultery, and stated that in September, 1858, she came with her husband from Jersey, where they were residing, to London, to consult a physician as to the state of her health; that she then went to Ipswich to visit her family; that about a week afterwards a brother of her husband's (he having separated from her) made an application for her signature to a deed of separation, which she refused to give; that her husband had since they separated made her an allowance of £2 a fortnight; that the petition was served upon her by her husband's solicitor, to whom she said that the statements in it were utterly untrue; that he told her that if she appeared, she would lose her allowance and be left penniless; and that if her husband did not get a divorce, he would go abroad with the children, and she would have to go to the workhouse; that being intimidated by this representation, and not knowing what to do, she had not appeared to the petition. November 30.

1859. December 14.

ALEXANDER v. ALEXANDER AND AMOS.

THE JUDGE ORDINARY made an order calling upon the petitioner to show cause why the respondent should not be allowed to appear and file an answer to the petition.

No cause having been shown on the part of the petitioner, the Court made the rule absolute.

1860. April 30.

The case again came on before the full Court for hearing.

Dr. Deane, Q.C., and *Mr. Maude*, appeared for the petitioner.

Mr. O'Malley, Q.C., and *Mr. Couch*, for the respondent, who had filed an answer denying the adultery.

Patrick Sullivan, a farm labourer, was again examined, and said he was in Mr. Alexander's service from January to about August, 1858. In April or May, Amos went into the service as groom. Amos had a great many conversations with him about Mrs. Alexander, and said to him, about six weeks after entering the service, that he would have connection with her before long. Between ten and eleven o'clock one night he put a ladder up to the window of a bedroom in which one of the children, a boy twelve years of age, was lying ill, and watched Mrs. Alexander and Amos. He heard them go into another room, and went round to a stable, upon which he climbed, and looked through the window of that room. It was a bedroom on the same floor. He witnessed them in an act of adultery. He then went to the stable, got some sand, and threw it against the window. Mrs. Alexander and Amos came down. Mrs. Alexander was drunk and could hardly tell what she did. He said he should tell his master. They both struck him and dragged him about the yard. They went to his room, took his clothes, and threw them about the yard. He considered that his mistress might not do wrong again, and he did not therefore then tell his master. He said to Mrs.

Alexander that he would not tell. She and Frank went into his bedroom with him, and she said she would be as good as a mother to him if he did not tell. Mr. Alexander and Miss Ada, his daughter, were out. Frank and he slept in the same room in an outhouse looking into the yard. One day, when Mr. Alexander was at a review, he watched Mrs. Alexander and Amos, and saw them kissing each other in the kitchen. Not many days before he left, he saw Mrs. Alexander and Amos together in the outhouse in the afternoon. He went in and saw them in an indecent attitude. He one morning told Mr. Alexander what he had seen, and Mr. Alexander turned him away. He and Mrs. Alexander and Amos were brought face to face by Mr. Alexander, and he was going to tell all he had seen, but Mr. Alexander would not listen to him. Amos struck him, and kicked him, and knocked him about. He did not see Mr. Alexander again until the following Christmas. On the occasions of which he had spoken, Mrs. Alexander and Amos were generally three-parts drunk, and he heard the other servants had fetched brandy for them.

In cross-examination the witness gave a very confused account of the circumstances under which he had seen the acts of improper familiarity of which he had spoken. He was standing two or three hours on the ladder watching. He went back to Mr. Alexander's service at the beginning of 1859, and had remained in it up to last week. Some discrepancies were also elicited between his evidence at the last trial and his present statements.

Eliza Vallens, a girl who had been in Mr. Alexander's service, first as housemaid and then as cook, also spoke to several acts of improper familiarity between Mrs. Alexander and Amos.

In cross-examination she said she was still in Mr. Alexander's service. She had a sister who was in his service in 1858. Her sister went to Australia about Christmas, 1858. She did not tell Mr. Alexander anything about Amos's conduct

1860. April 30.

ALEXANDER v. ALEXANDER AND AMOS.

until after Mr. Alexander had been to England with his wife. Her attention was called to several statements she had made at the last trial, which were entirely at variance with her present statements, but she said that on the former occasion she had made mistakes.

Mrs. Randall, the widow of a medical man who had lived within a few minutes' walk of the Alexanders at Jersey, said that Amos was a married man, and had lived in their service for ten years before he went to the Alexanders. He was discharged by Mr. Alexander on the 2nd of September, 1858. On the 4th of September she saw Mrs. Alexander and Amos driving together in a gig along a lane between her house and Mr. Alexander's. She afterwards went to Mrs. Randall's. She said she wanted to see Frank, to get some plate. Mrs. Randall spoke to her about her conduct; she said she would not be talked to. Two days afterwards Mr. and Mrs. Alexander went to England together to get medical advice for their sick child. She frequently visited the Alexanders, and had noticed that Mrs. Alexander was too familiar in her manner with Amos.

Mr. John Alexander, a brother of the petitioner, and a banker at Ipswich, was then examined to prove Mrs. Alexander's handwriting to two letters she had written, one to Amos and one to his wife, since the separation, asking him to bring a parcel to her mother's at Ipswich, where she was staying. It appeared that after coming from Jersey, Mr. and Mrs. Alexander lived together for a short time in lodgings in London, with their sick child, that Mrs. Alexander went to Ipswich to pay a visit to her relations, and that while she was there her husband returned to Jersey, and then finally separated from her. Six years ago her husband's family had endeavoured to induce her to sign a deed of separation, but she refused. That endeavour was renewed while she was at Ipswich, before the petition was presented, but again failed.

Dr. Deane, in addressing the Court for the petitioner, sub-

mitted that Mrs. Alexander's counsel was not entitled to treat the examination at the former hearing as evidence in the cause, as she was not then a party to cause. He could only refer to those parts of the evidence which had been examined on.

THE JUDGE ORDINARY: If I had treated this as a mere adjournment of the case, I should have hesitated long before I allowed you to call the same witnesses to improve your case.

Mr. O'Malley addressed the Court for the respondent.

THE JUDGE ORDINARY (after consultation): We are now called upon to decide whether Mrs. Alexander has been guilty of the adultery charged against her.

In deciding this question, we must act upon the same principles as juries are directed to act upon in deciding similar cases. It is a well known principle of our jurisprudence that the party who alleges misconduct against another is bound to establish such misconduct by affirmative evidence. Unless, therefore, it is proved to the satisfaction of the Court, that the respondent has been guilty of the misconduct imputed to her, it is bound to dismiss the petition.

The particular adultery charged is with a groom who was in the employment of Mr. Alexander; and it is said that it was committed in 1858, only three months after he had entered his service. Mrs. Alexander is a person of humble origin, and was at the time of her marriage of scarcely any education; she had not been brought up in habits of delicacy and refinement, and some allowance must therefore be made for her conduct in some of the particulars proved. She continued to live with her husband from her marriage in 1838, until September, 1858, always under the displeasure of his family; and there were several children of the marriage. There is not a tittle of evidence to show that during the whole period of their cohabita-

1860.
April 30.

ALEXANDER v. ALEXANDER AND AMOS.

tion she had done anything to raise the slightest suspicion of her infidelity in the mind of her husband, or that up to the time of the alleged adultery she had in any way misconducted herself. The Court is now called upon to believe that Mrs. Alexander at once, without any preparation, condescended to disgrace herself with a groom who had been about two months in her husband's service, with so little regard for decency, with so little regard as to whether she was discovered or not, that she was guilty of acts of adultery with him in the face of day, without taking the precaution of pulling down a window-blind, or closing a washhouse door. There may be cases of this sort in which passion, amounting to insanity, may lead a person to forget all sense of duty, all regard for decency, and all fear of detection. But is there any evidence of this sort here? If a case of this description is to be established, it must be proved by the most cogent testimony.

Upon an examination of the evidence of Sullivan and Vallens, the Court is of opinion that it is in itself so improbable, and so inconsistent with what they had said on the former trial, that it is impossible for the Court to act upon it. No woman's character would be safe, if it could be destroyed under the circumstances proved in this case. It is stated that Mrs. Alexander was a person of drunken habits; but if this had been so, the persons who visited at the house must have noticed it.

The Court does not consider that the adultery charged is proved, and is therefore bound to dismiss the petition.

Proctors for the petitioner, *Laurie and Co.*
Solicitor for the respondent, *Fluker.*

1859.
March 9.

(*Before the* JUDGE ORDINARY, *on Motion.*)

DICKENS *v.* DICKENS.

DICKENS
v.
DICKENS.

Wife's Costs.—Wife's Petition.—Taxed Costs during Suit.—Practice.

On taxation of wife's costs in a petition for judicial separation pending suit, the registrar disallowed all costs incurred before actual proceedings taken against the husband, and various items charged for attendance on the wife's father in connection with her case. On cause shown against a rule *nisi* for a review of taxation:

The Court affirmed the registrar's taxation as being in accordance with the practice of both the common law and ecclesiastical courts.

This was a question of the taxation of the wife's costs against the husband, pending the suit, in a petition for judicial separation by reason of the husband's adultery. The petitioner's bill amounted to £75. 19*s.* 2*d.*, of which the registrar disallowed £38. 2*s.* 2*d.*; of this upwards of £31 consisted of various expenses in taking opinions and advice previous to "the instructions for a petition." The remainder of what was disallowed chiefly consisted of charges for attendances on and conferences with Mr. Weller, the petitioner's father.

February 23.

Mr. John B. Karslake, for the petitioner, prayed a rule to show cause why the registrar's taxation should not be reviewed. There were two classes of items disallowed by the registrar, both of which he submitted ought to have been allowed; one related to matters preliminary to the filing of the petition, the other class of items was thus incurred:—Mrs. Dickens was in ill health; her father consequently acted for her in the matter, and there were certain necessary attendances on and conferences with him charged for. These attendances and conferences, under the peculiar circumstances of the case, should be treated as if they had taken place with Mrs. Dickens.

1859. March 9.

DICKENS v. DICKENS.

THE JUDGE ORDINARY: The mode of reviewing the registrar's taxation in the ecclesiastical courts was to proceed by act on petition and affidavits. For the future I think the most convenient and least expensive course will be to follow the practice of the courts of common law, and to take a rule to show cause why the taxation should not be reviewed. The motion should be supported by an affidavit showing in what respect the taxation is objected to, so as to enable the taxing registrar to furnish the Court with a report before the rule comes on for argument. The expenses preliminary to the institution of the suit would not have been allowed at common law. I shall adhere to this practice, unless you can show that they would have been allowed in the ecclesiastical courts. With reference to the charges for the attendances on the father of the petitioner, if the registrar disallowed them on the ground that attendances upon any other person than the wife could not, under any circumstances, be allowed, this may be deserving of consideration. You may take a rule generally. *Rule* nisi *granted.*

Dr. Swabey, for the respondent, showed cause. With respect to the first class of items, neither at common law nor in the ecclesiastical courts were any costs as between party and party incurred previous to the institution of the suit allowed to be taxed; and the registrar was bound to disallow the £31. As to the items of attendance, etc., upon Mr. Weller, they were most of them unnecessary, even allowing Mrs. Dickens to have been so ill as not to be able to see her own attorney.

Dr. Phillimore, contrà. *Cur. adv. vult.*

March 9. THE JUDGE ORDINARY: This was an application to review a taxation of costs taxed during the progress of the suit. It was first objected that the taxing officer had struck off a num-

1859.
March 9.

DICKENS v. DICKENS.
March 2.

ber of items in respect of certain steps taken by the wife preliminary to the principal proceeding; in so doing he followed the practice of the Common Law Courts, of the Prerogative Court, and of the Courts which this Court represents, and as to these items I must confirm his taxation. Secondly, there were a number of items for attendances on the wife's father, Mr. Weller. I find that it would be quite contrary to the practice of the ecclesiastical courts to allow for attendances on any one except the party herself. It would appear from the aspect of the bill, that Mr. Weller, taking a natural interest for his daughter in the suit, looked into the attorney's office whenever he passed that way, and talked matters over. I must confirm the taxation. The rule must therefore be discharged.

Rule discharged.

(*Before the* JUDGE ORDINARY, *on Motion.*)

1860.
March 28.

SOPWITH v. SOPWITH.

SOPWITH v. SOPWITH.

Wife's Costs.—Wife's Petition dismissed.—Taxation of Costs.—Practice.

Where the registrar has directed a sum of money to be paid into Court to meet the expenses of the wife's petition at the hearing, and her suit fails, the husband will not be liable to a greater amount than the sum so paid in, though the wife's costs as ascertained on taxation exceed that sum.

This was originally a petition by the wife for judicial separation by reason of the husband's adultery. The case was tried by the Judge Ordinary without a jury. The learned judge was of opinion that the evidence failed to establish the adultery, and dismissed the petition. £90 had been paid into court by order of the registrar before the hearing to meet the

1860. March 28.

SOPWITH v. SOPWITH.

wife's costs. After the trial the wife's costs were taxed by order of the Court, and were found to amount to £132. 10*s*.

Dr. Spinks now moved the Court for an order on the respondent to pay the balance, viz. £42. 10*s*. The amount here was that ascertained on the taxation directed by the Court. There was no laches on the part of the wife, but an error of judgment in the registrar in directing £90 only to be paid in.

Dr. Wambey, for the respondent, *contrà*.

THE JUDGE ORDINARY: I am of opinion that no order should be made. I have already decided that where the wife has failed in her suit, she is not entitled to a larger sum than has been paid into the registry to meet the costs of the hearing, for according to the old practice, on failure of the wife's suit, the Court would have made no order for the payment of her costs if they had not been paid before the trial. The ecclesiastical courts allowed these costs to be taxed, and enforced their payment before the hearing, in order that the wife might not be deprived of justice from being unable, from want of funds, to appear at the hearing. The practice in the House of Lords was to order a sum of money to be paid to the wife to enable her to obtain professional assistance.

In this Court it is impossible to tell accurately before the trial to what the costs of the hearing will amount. I therefore considered that I should best do justice by making the nearest approximation to what was the old practice, and accordingly directed the registrar to fix such a sum as, from the representations of the parties, would, to the best of his calculation, meet the wife's costs, and that the husband should pay that sum into the registry, or find security for the same, so that the wife's professional adviser up to that amount may be se-

cured. As to anything beyond that, the wife in this case must be in the position of any other failing suitor.

Motion rejected.

1860.
March 28.

SOPWITH
v.
SOPWITH.

(*Before the* JUDGE ORDINARY, *on Motion.*)

November 7.

ALLEN *v.* ALLEN AND D'ARCY (on Motion).

ALLEN
v.
ALLEN AND
D'ARCY.

Wife's Costs.—Suit for Dissolution by the Husband.—Some issues found for the Petitioner, some for Respondent.—Petition dismissed with Costs.—Principles of Taxation.—Definition of Connivance.

Costs of wife in a matrimonial suit are taxed as between party and party, but not in all respects on the same principles as a taxation at common law between party and party. Thus, though certain issues may have been found against the wife, whose costs are being taxed, the expenses incurred by them will be allowed unless the registrar should think that they were wantonly and vexatiously raised. Expense of witnesses to prove the circumstances of a plea not in issue, if such circumstances have a bearing on other parts of the case in issue, may be allowed; and a reasonable amount of expense incurred in investigating and acquiring information as to the circumstances of the case should be allowed.

This was a question as to the principles applicable to the taxation of costs in matrimonial suits. It was originally a petition for dissolution of marriage presented by the husband against the wife, by reason of her adultery with Robert D'Arcy. The respondent denied the adultery, pleaded condonation and connivance, and charged the petitioner with adultery and cruelty.

The respondent alleged condonation as to the adultery pleaded, denied the cruelty, but alleged condonation of it (if any).

1860. November 7.

ALLEN v. ALLEN AND D'ARCY.

The case was tried before the full Court (the JUDGE ORDINARY, Watson, B., and Hill, J.) and a special jury, on the 2nd, 3rd, and 5th days of December, 1859.

Mr. Edwin James, Q.C., *Dr. Deane*, Q.C., *Dr. Wambey*, and *Mr. T. L. Clarke*, being counsel for the petitioner.

Mr. M. Chambers, Q.C., *Mr. Hawkins*, Q.C., and *Dr. Spinks*, for the respondent.—The jury by their verdict found that the adultery* of Mrs. Allen had been proved, that the husband had connived at the adultery (adding that they were of opinion that there had been a base conspiracy against Mrs. Allen), and found the other issues in favour of the husband.

Upon this the Court expressed their entire approval of the verdict, and, referring to the 29th and 30th sections of the Divorce Act, dismissed the petition with costs.

On the taxation of the wife's costs, the registrar disallowed a large amount of the bill tendered, proceeding, in two main points, on the common law rule of not allowing for the issues found against the wife, or for the expenses incurred by jour-

[1] Hill, J., in summing up the case to the jury, observed on the issue as to connivance: "That the jury must take the law from the Court as "to what constituted connivance. That in order to justify them in "finding by their verdict that the husband had been guilty of connivance, "they must be satisfied from the facts, which had been established in "evidence, that he had so connived at his wife's adultery as to have given "a willing consent to it. They would have to consider whether he was "or was not an accessary before the fact. Mere negligence, mere in-"attention, mere dullness of apprehension, mere indifference, would not "suffice; there must have been an intention on his part that she should "commit adultery. If such a state of things had existed as would, in "the apprehension of reasonable men, result in the adultery of the wife, "—whether that state of things was produced by the connivance of the "husband, or independent of it,—and if the husband, intending that the "result of adultery should take place, did not interfere, when he might "have done so, to protect his own honour, he was guilty of connivance. "Such was the rule that they must apply to the facts before them."

neys to Paris and elsewhere, to identify the co-respondent, and produce evidence of his previous intimacy, under some other name, with the petitioner, such identification and evidence having a material bearing on the issue of connivance, *i. e.* in this case, of a conspiracy to bring about the adultery of the wife.

1860.
November 7.
ALLEN
v.
ALLEN AND D'ARCY.

Dr. Spinks, for the respondent, moved the Court for a rule *nisi* to direct a revision of the taxation. He submitted that the registrar had been in error in following the common law rule with respect to costs of issues found against the respondent; it would deprive the wife of her defence, if the solicitor's right to his costs depended on the success of the defence. It was not a question of taxation between party and party; the wife was not liable to costs, but the husband paid costs as for his wife's attorney; the taxation, therefore, ought to be as between party and attorney. The witnesses produced to prove the circumstances of the adultery of the husband, though it was admitted, laid a ground and showed a motive for the conspiracy. As to the expenses incurred in investigating certain circumstances in this case, how could the wife, or her advisers, safely put such a plea as connivance on the record without prior investigation?

November 7.

The Court granted a rule *nisi*.

Dr. Wambey now showed cause. He admitted that he was not prepared to support the taxation in all respects. The common law principle of taxing costs as between party and party was inapplicable to matrimonial suits, the husband being liable for costs in these suits on the presumption that he has the whole of the property, and that the wife has no funds of her own with which to defray her costs. The jury had found that the husband had not been guilty of cruelty as charged by the wife; she had no reasonable grounds for pleading it, and the husband therefore ought not to be liable for her costs of

November 14.

1860. November 7.

ALLEN v. ALLEN AND D'ARCY.

attempting to prove it. (*Brown* v. *Akroyd*, 5 Ell. & Bl. 819.) The registrar had allowed £52. 10*s*. for instructions for the brief, which ought to cover the expense incurred in investigating the circumstances connected with the charge of connivance. Mrs. Allen was not concerned in the motion to dispense with service on the co-respondent, and ought not to have the costs for appearing on that motion. She was also disentitled to the costs of the motion to postpone the trial. It was made on the ground of the absence of John Boxell, who was alleged to be a necessary witness, and yet he was not examined at the trial.

November 21. THE JUDGE ORDINARY: This taxation must certainly be reviewed. The question of the principle on which costs are to be taxed in matrimonial suits has not yet been settled, but I apprehend that I must adopt, as far as I can, the principles on which the Ecclesiastical Courts proceeded. I am informed that the principle of taxation in those courts was as between party and party; but that term had a very different construction from that put upon it in Common Law Courts, because there they only allow the costs of such issues as are found for the persons who are to receive costs. I think that the only limit which can with propriety be put upon the allowance of the costs of the different issues raised in this Court is this: where the taxing officer is satisfied that an issue has been vexatiously and improperly put on the record, so as to occasion a wanton and unnecessary increase in the amount of costs, he is not to allow the costs of that issue. The party guilty of putting such an issue on the record must take the consequences and lose his costs; but that is the only limit. With reference to the number of witnesses called to prove any particular fact, in a case where expenses are to be allowed, that must be a question for the discretion of the registrar. That question, again, depends upon whether there was any reasonable ground for calling them, or whether the attorney

has oppressively called or subpœnaed a number of persons whose evidence he, as a professional man, would know would be of no service to his client. Subject to that limitation, the expenses of witnesses of course are to be allowed. The question as to the costs of the issue of cruelty is disposed of by what I have already said. The registrar would hardly find in this case that there was no pretext for introducing such a charge. A good deal of evidence was given on the subject of cruelty, and it was only the evidence on the other side which showed that the charge could not be maintained. Then there is the question of the expense of taking witnesses to Paris, for the purpose of giving evidence as to identity and handwriting. In the Common Law Courts the expense incurred by witnesses in obtaining information are not allowed. If a witness makes a journey to learn something, he is not allowed the expenses of his journey. I have inquired whether the same principle was applied to the taxation of costs in the Ecclesiastical Courts, and I am told it was not, but that where a journey to procure information was necessary to prove the case, the cost of the journey was allowed as a necessary expense for the wife. I think a reasonable amount should be allowed for those expenses. If the registrar, in allowing fifty guineas for instructions for the brief, included those expenses, he will probably not allow anything more, but it is a matter for his discretion. With reference to the motions to dispense with service upon the co-respondent, I cannot see how the wife could have an interest in the matter, and she cannot therefore be allowed the costs. It is reasonable to allow costs of the postponement of the trial to procure Boxell's attendance. The proof of the adultery of the petitioner, under particular circumstances, was, I think, legitimate evidence, bearing upon the issue of conspiracy. The taxation will be reviewed upon these principles.

1860.

BAILY v. BAILY AND DELLA ROCCA.

(*Before the* JUDGE ORDINARY, *on Motion.*)

BAILY *v.* BAILY AND DELLA ROCCA.

Wife's Costs.—Commission for Examination abroad.—Sum advanced for Wife's Expenses.

The Court having, with the consent of the husband and wife, made an order for a joint Commission to issue for the examination of witnesses at Rome, directed the husband to advance to the wife a sum (the amount to be settled by the registrar) to enable her to defray her expenses of the Commission.

Dr. Spinks, for the petitioner, moved for a Commission to issue for the examination, at Rome, of certain necessary and material witnesses.

Mr. Pritchard, for the respondent, did not object to the motion. The wife was desirous of examining witnesses herself also at Rome. He submitted, however, that the Commission should be granted subject to an order on the husband to pay into the Registry a sum sufficient to defray the expenses of the wife in respect of the Commission. He cited *Hood* v. *Hood*,[1] Pritchard's Handbook, p. 211.

THE JUDGE ORDINARY: There should be a joint Commission. The Commissioner should be appointed by agreement

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[1] HOOD *v.* HOOD.

(*Before the* JUDGE ORDINARY, *on Motion.*)

July 13, 1858.—This was a suit for dissolution of marriage, in which an application was made on behalf of the husband for a Commission to examine witnesses in Australia.

PER CURIAM: "The Commission may issue. The husband must "however advance such a sum of money as the registrar may think sufficient to defray the wife's expenses in respect of such Commission."

See *Fitzgerald* v. *Fitzgerald*, 2 Lee 312.

between the parties, and if they cannot agree upon a Commissioner, the Court will appoint one. I think the petitioner should advance to the wife a sum of money to enable her to defray her expenses of the Commission; the amount to be advanced to be settled by one of the Registrars of the Court.

(*Before the* JUDGE ORDINARY.)

July 25.

THOMAS v. THOMAS.

THOMAS v. THOMAS.

Petition for Judicial Separation.—Deed to live separate.—Connivance and Consent.

A husband and wife executed a deed of separation in 1854, which recited, amongst other things, that the husband had for some months been living with a Miss H., and referred to certain articles of agreement concerning certain trust-moneys and other property to which Miss H. as well as the husband and wife had been party. In 1860 the wife petitioned for a judicial separation on the ground of the husband's adultery with H. in 1858–1859:

The Court held that the execution of the deed of separation by the wife, knowing at the time that the husband was cohabiting with H., was virtually a consent to the continuance of such cohabitation, and dismissed the petition.

This was a petition for judicial separation and custody of children at the suit of the wife, by reason of the husband's adultery.

The petition alleged the marriage of the parties in April, 1839, and the birth of eight children, and charged adultery between the 1st of March and 1st of August, 1858, at Greenwich, and on subsequent dates at Dublin, London, and Gravesend, with a Miss Hargrave.

The answer of the husband denied the adultery, and alleged

1860. July 25.

THOMAS v. THOMAS.

that the petitioner was fully cognizant thereof, conniving thereat, and consenting thereto.

At the hearing it appeared that in 1854 a deed of separation was executed, to which Mr. Thomas, Mrs. Thomas, and two gentlemen of the name of Everard, Mrs. Thomas's brothers, as her trustees, were parties. This deed contained, among others, the following recitals:—

"And whereas a post-nuptial settlement was agreed upon "and executed between and by the same parties, on or about "the 3rd of August, 1839, whereby certain moneys and pro- "perties of the said Ann Thomas were settled and secured for "her sole and separate use and benefit for life, and after her "death for the use and benefit of her said children, etc., but "of which said moneys and property the said J. N. H. Tho- "mas afterwards himself became and is still wrongfully pos- "sessed. And whereas the said J. N. H. Thomas, several "months ago, left his said wife and children at their residence "at Millbrook aforesaid, and has since been living in Ireland "aforesaid with one Miss Elizabeth Margaret Hargrave, and "proceedings have been accordingly taken, and are now pend- "ing against him, in the Court of Chancery in Ireland afore- "said, for compelling the restitution and resettlement by him "of the moneys and property aforesaid, upon the trusts above "referred to, and proceedings have also been contemplated "and threatened to be taken against the said J. N. H. Tho- "mas in the ecclesiastical or other proper court, for obtaining "a divorce between him and his said wife, etc.; and whereas, "in order to put an end to the said suit or proceedings so "pending, and also to prevent further litigation and expense, "certain articles of agreement were made and entered into by "and between the said several parties hereto, and the aforesaid "Elizabeth Margaret Hargrave, on the 11th day of November "last, whereby (amongst other things) terms have been set- "tled and agreed upon for the refunding or securing the afore- "said trust-moneys and property, and making further provi-

"sions for the future maintenance and benefit of the said Ann "Thomas and her aforesaid children, and whereby it was also "arranged and agreed, on the requirement of her the said "Ann Thomas, that such deed of separation, with such addi- "tional provision for herself and children, should be made "and executed between and by her and her aforesaid husband "as are hereinafter respectively contained and set forth."

Mr. Maples, of Spalding, who acted as Mrs. Thomas's solicitor in the transactions referred to in the deed of separation, said, on cross-examination by respondent's counsel, that he was sent over to Ireland by Mr. Everard; that he saw Mrs. Thomas before he went over to Ireland; that he went there for the purpose of finding Mr. Thomas and Miss Hargrave; that he heard from Mrs. Thomas they had been living in the house together in England; that he received instructions from Everard to commence a suit against Mr. Thomas in the Irish Court of Chancery to recover the trust-money; that he afterwards drew a deed of separation between Mr. and Mrs. Thomas; that the deed produced was executed by the parties and the new trustees; that the Elizabeth Hargrave there mentioned was the person with whom the charge of adultery is now brought; that he had within a year or two received a sum of money from Mr. Hooper, Miss Hargrave's solicitor, consisting of £1080. 0*s.* 9*d.*, trust-fund recovered; £159. 6*s.* 9*d.*, taxed costs in Chancery; £150, further costs; £259. 19*s.* 3*d.*, estimated moiety of the Terenure estate, on which estate he had obtained a security for the trustees; that the Terenure estate had been conveyed to Mr. Thomas and Miss Hargrave jointly.[1]

[1] To prevent any misunderstanding arising from this evidence, it may be as well to state that Miss Hargrave had, in 1852, been residing as a lodger with Mr. and Mrs. Thomas, at their house in Cornwall, and that the Terenure estate was a house and grounds near Dublin, purchased as above stated, though Mrs. Thomas was not aware of the fact till the summer of 1854.

1860.
July 25.

THOMAS
v.
THOMAS.

July 19.

Dr. Spinks submitted that this deed was executed by the petitioner in contemplation of the continuance of the adulterous connection then existing between her husband and Miss Hargrave, that the present suit could not have been instituted in consequence of her feeling aggrieved at the injury she had received, because she had taken no steps to obtain a divorce for several years after the execution of the deed, and that the case was governed by *Matthews* v. *Matthews* (*ante*, Vol. I. p. 499).

Dr. Deane, Q.C. (*Mr. G. H. Cooper* with him), for the petitioner, said, there was no case in the Ecclesiastical Courts in which a deed of separation had been held to be a bar to a suit for divorce. The deed in this case merely carried into effect an arrangement about money, and put an end to litigation respecting the trust funds. Mrs. Thomas and her trustees merely undertook, for a certain consideration, that the proceedings in Chancery should be abandoned, and there was no pretence for suggesting that she intended to allow her husband to continue to live in adultery. The deed referred to the past, not to the future.

THE JUDGE ORDINARY: If a wife once consents to allow her husband to commit adultery, she has no right afterwards to claim a decree on account of that adultery.

Dr. Deane: This deed was only a remission of that which was past; it was an abandonment of proceedings on account of what had occurred up to the date of its execution.

THE JUDGE ORDINARY: Assume that there is no express license for the future, but when you find a woman with a clear case against her husband, saying to him, "I know you have "committed adultery, and I am about to sue for a divorce, "and to get alimony, but if you will come to terms, and

"give me a certain sum, I will not take proceedings," she being cognizant that he is living in adultery at the time, do you mean to say that is no evidence of her connivance at his continuing to do so?

1860. July 25.

THOMAS v. THOMAS.

Dr. Deane could not deny that it was.

THE JUDGE ORDINARY: We should introduce a strange state of morals into the country if we did not say that it was. My present impression is, that the deed is an answer to the suit. *Cur. adv. vult.*

July 24.

THE JUDGE ORDINARY: It was urged in this case, that the deed of separation which had been executed, and to which the wife was a party, was a sufficient ground for dismissing her petition.

I certainly thought it would be very strange if, after executing a deed of that description, and being cognizant of, and approving of the negotiations which led to its preparation, it was open to her to insist upon a judicial separation on account of the adultery which her husband had committed since the date of the deed with the person with whom he was cohabiting when it was executed. I have looked into the authorities on the subject, and I find in *Barker* v. *Barker* (2 Add. 285) ample authority for the opinion I had formed. In *Barker* v. *Barker*, the Chancellor of London considered that the deed of separation did not itself give a license to the husband to commit adultery, but that it was evidence of consent on the part of the wife to his committing it. There was an appeal to Sir John Nicholl, and that learned Judge said, not that the deed would not be evidence to that effect, but that it was not in itself an authority for the adultery. Then treating it only as evidence that might be rebutted by other evidence, he considered that the evidence which had been given before him was sufficient to rebut it.

1860.
July 19 & 25.

THOMAS
v.
THOMAS.

The deed, in the present case, does not in terms in itself constitute a license to the husband, but let us see what it is. It recites "a post-nuptial settlement between the lady and her "husband, and that the husband several months ago left his "wife and children at their residence at Millbrook, and has "since been living in Ireland with one Elizabeth Margaret "Hargrave, and proceedings have been accordingly taken and "are now pending against him in the Court of Chancery in "Ireland, and proceedings have also been contemplated and "threatened to be taken against him in the Ecclesiastical or "other proper court for obtaining a divorce between him and "his said wife, and alimony for herself and children, and "whereas, in order to put an end to the suit or proceeding so "pending as aforesaid, and also to prevent further litigation "and expense, certain articles of agreement were made and "entered into by and between the said several parties hereto, "and the aforesaid Elizabeth Margaret Hargrave, on the 11th "day of November last, whereby, amongst other things, terms "have been settled," etc.—Here is a lady, who, knowing that her husband had been, and was then living in a state of adultery with this Elizabeth Hargrave, threatens him with proceedings in the Ecclesiastical Court, and then enters into a negotiation whereby a certain provision is made for her and her children, in order to prevent further proceedings in Chancery, and litigation in the Ecclesiastical Court.

Is there any provision in the agreement, that the husband is to cease, or is it contemplated by her that he should cease, to maintain his adulterous connection with the other woman? It is impossible to draw any other inference from this deed, than that she was a consenting party to his continuing to live in a state of adultery, and therefore her petition must be dismissed.

CASES

IN THE

COURT OF PROBATE.

In the Goods of EDWARD MILLER MUNDY, Esq. (deceased).

1860.
Nov. 14 and 21.

In the Goods of EDWARD MILLER MUNDY.

Codicil.—Informal Paper.—Doubt as to Dispositive Effect of.—Title to Probate.

B. on his deathbed dictated a writing in the form of a letter, but attested by two witnesses, requesting C., the devisee for life of certain estates under B.'s will, to consent to charge them with £10,000, to be raised as soon as possible after B.'s death, adding that he knew the request was not legal. The Court decreed probate of the paper on motion, in order that the question of construction might be brought before a court of equity.

This was a question of the title to probate of a pencil writing in the following terms:—

"Barbadoes, Jan. 23, 1849.

"My dear Alfred,—It is my deathbed request that you will "consent to charge the Shipley estate with £10,000, to be "equally divided between our dear brothers and sisters; and "that this sum shall be raised and paid as soon as possible "after my death. I make this request knowing that it is "not legal, but trusting in your affection to myself and to our "dear brothers and sisters. I feel satisfied also, in the very "improved condition of the property, that this charge will be

1860. Nov. 14 and 21.

In the Goods of EDWARD MILLER MUNDY.

"no serious encumbrance to you." [The remainder of the letter was immaterial.]

"E. M. MUNDY.

"Witness, 23rd Jan., 1849, HENRY S. WILMOT.

"WM. CLARKE, M.D."

From the affidavit of Sir Henry S. Wilmot, one of the witnesses, it appeared that the testator was tenant-in-fee of the Shipley estates, and that under his will and codicils, proved by his executors on the 11th of August, 1849, Alfred Miller Mundy, the person addressed in the above note, was the present tenant for life; that the pencil writing was made by Sir Henry S. Wilmot, at the dictation of the deceased when on his deathbed, and duly executed; that the £10,000 had been paid by Alfred M. Mundy; that the paper had been treated as untestamentary when the will and codicils were proved; but that, in consequence of counsel's opinion lately taken, it was thought desirable to prove the paper in question.

Dr. Deane, Q.C., moved for probate. Whether the words of this paper are operative, and in what manner, is a question for a court of equity; but if it is not entitled to probate, a court of equity cannot take notice of it. He cited *Chaworth* v. *Beech*, 4 Ves. 565. *Cur. adv. vult.*

SIR C. CRESSWELL; I think, as the construction of this document raises a question which would be more properly decided by a court of equity than by this Court, I ought to grant probate of it.

1860.
December 5.

ROSBOTHAM AND OTHERS v. ROSBOTHAM.

ROSBOTHAM AND OTHERS v. ROSBOTHAM.

Suit for Revocation of Probate.—Declaration.—Pleading.—Practice.

Where the executors of a later will having called in the probate of a will of prior date, propound in a declaration the later will, it is not competent to them to allege in their declaration that the probate of the earlier will was surreptitiously obtained, or that the earlier will ought to be pronounced null and invalid.

The defendant in this cause (Margaret Rosbotham) had obtained probate in common form of an alleged last will of Samuel Rosbotham, deceased, bearing date the 13th of June, 1859. The plaintiffs alleged themselves to be executors of a later will of the said Samuel Rosbotham, which bore date the 19th of June, 1860, and as such executors issued a citation against the defendant, calling upon her to bring the said probate into and leave it in the Registry, and to show cause why the same should not be revoked, and the said pretended will pronounced to be null and invalid. The defendant had appeared to the citation, and had brought in the probate. The plaintiffs then filed their declaration, in which, after propounding the will of June 19, 1860, it was alleged "that, "notwithstanding the premises, the defendant being well "aware of the existence of the said last will of the said de- "ceased, on the 21st of September, 1860, *surreptitiously* ob- "tained probate of a pretended will of the said deceased, "bearing date the 13th of June, 1859; that the said probate "having been, in obedience to a citation issued at the suit of "the plaintiffs, brought into the principal Registry of the "Court, ought to be revoked, and the said pretended will "ought to be pronounced null and invalid."

Dr. Phillimore, Q.C., moved that the plaintiffs be directed to amend their declaration by striking out so much of it as

1860.
December 5.

ROSBOTHAM AND OTHERS v. ROSBOTHAM.

related to the will of the 13th of June, 1859, and to the probate thereof. By the declaration in the present form, two issues were sought to be put upon the defendant: first, as to the validity of the will of 1860; secondly, as to the validity of the will of 1859. If the will of 1860 were pronounced against, *non constat* that the plaintiffs had any interest to entitle them to oppose the will of 1859. He submitted that the plaintiffs had no right to endeavour in this suit to impose the second issue upon the defendant.

Dr. Spinks, contrà: This is a suit for the revocation of the probate of the will of 1859, and not a mere cause of proving in solemn form the will of 1860. By the citation the defendant is expressly cited to bring in the probate she had surreptitiously obtained, and to show cause why the probate should not be revoked, and this pretended will pronounced to be null and invalid. The declaration merely follows the citation. The defendant committed a wrongful act to the plaintiffs in obtaining this probate, and if she has done so, the plaintiffs are entitled to a remedy. She might bring her probate into the Registry, leave it there, refuse to plead, and thereby escape her liability for costs.

SIR C. CRESSWELL: As at present advised, I do not think that I have anything to do with trying the validity or invalidity of the will of 1859 at the present time. The question raised in the latter part of the declaration might, if the later will were pronounced for, come before the Court in some other form. It is not a proper subject for an issue. If the defendant were to plead to it, it might lead us into all sorts of irrelevant issues. The declaration must be amended by striking out the latter part of it.

1860.
December 19.

In the Goods of THOMAS TUCKER (deceased), on Motion.

In the Goods of THOMAS TUCKER.

Chain of Executorship.—Diocesan Grants.—Bank of England. —20 & 21 *Vict. c.* 77, *ss.* 86, 87.

A grant in a chain of executorship, made by a diocesan court in general terms, and not limited to property within its jurisdiction, is valid under the 87th section of the Probate Act, and entitles the personal representative of an original testator claiming under such grant to the transfer of stock standing in the Bank of England books in the name of the original testator.

SEMBLE, otherwise, if the diocesan grant were limited in its terms.

This was a question as to the right of the personal representative of Thomas Tucker, deceased, to the transfer of a sum in stock in the books of the Bank of England, under the following circumstances:—

Thomas Tucker died in March, 1800, leaving a will dated the 11th of July, 1799, whereby, among other things, he gave to his executors thereinafter named £600 five per cent. Bank Annuities, upon trust for the benefit of Mary Lankford for her life, with power of appointment among her children, and appointed Samuel Wright and William Townsend executors of his will, who proved the will in the Prerogative Court of Canterbury. William Townsend survived his co-executor, and died in July, 1814, leaving a will and two codicils, which were proved in the Prerogative Court of Canterbury by John Pownall and John Hogarth, the executors therein named. John Pownall survived his co-executor, and died in October, 1845, leaving a will, of which he appointed William Pownall sole executor, who proved the same in the Diocesan Court of Chester on the 6th of May, 1851.

Mary Lankford, the legatee, married William Harvey, and died on the 20th of December, 1859, a widow, leaving sons and daughters her surviving, among whom she had by will ap-

1860. December 19.

In the Goods of THOMAS TUCKER.

pointed the said sum of stock. Her will was proved by the three executors therein named on the 26th of January, 1860. The said sum of £600 was standing in the Bank books in the name of Thomas Tucker, deceased, but the Bank refused to transfer the stock to William Pownall, the executor of John Pownall, the surviving executor of Townsend, the surviving executor of the original deceased, contending that William Pownall should take out probate as to the goods not covered by the Chester grant, or that administration *de bonis non* of Thomas Tucker should be obtained. Application had been made to the Registrars for a citation against William Pownall to accept or refuse a further grant of probate, and against the residuary legatee in Tucker's will, to show cause why administration should not be granted to the appointees under Mrs. Harvey's will, and, as such, substituted legatees in the will of Tucker. The Registrars desired the opinion of the Court as to the effect of the 87th section of Probate Act, 1857, on the facts above stated to be taken.

Dr. Spinks moved the Court accordingly, but stated that in his opinion William Pownall was already, under the Chester grant, entitled to the transfer. The 87th section enacts that "Legal grants of probate and administration made before the "commencement of this Act, and grants of probate and ad- "ministration made legal by this Act, shall have the same "force and effect as if they had been granted under this Act, "but in every such case there shall be due and payable to her "Majesty such further stamp duty, if any, as would have been "chargeable on any probate or administration which, but for "this Act, would or ought to have been obtained in respect "of the personal estate not covered by the grant," etc. He referred to *The Goods of George Freckleton*, 1 Swab. & Trist. 16.

SIR C. CRESSWELL: I think, if the Chester grant had been

1860.
December 19.

In the Goods of THOMAS TUCKER.

in terms limited to property within the jurisdiction of the diocesan court, it could have extended to nothing else. I find the ordinary form for diocesan courts was "property within the diocese," but Chester as well as London adopted the general form. I have great difficulty in allowing these citations to issue. I doubt whether I ought to burden the subject with the necessity and expense of a further grant. Either the Chester grant was a good grant, or it might have been assailed; if assailable, then the 86th section of the Probate Act comes in: "All grants of probates and administra-"tions made before the commencement of this Act, which "may be void or voidable by reason only that the courts from "which respectively the same were obtained had not jurisdic-"tion to make such grants, shall be as valid as if the same "had been obtained from courts entitled to make such grants," etc. If unassailable, it is good without that provision, and the 87th section gives it the same force as if granted under the Probate Act. I think the person who has the Chester grant is entitled to the transfer of the stock; it might be otherwise where the limited form has been adopted in the diocesan registry. The Bank of England is well advised, and naturally anxious to be secure in the transfers it makes; and if they are not satisfied with this expression of my opinion, which in fact I gave in *The Goods of Freckleton*, the most satisfactory way of settling the question will be by application to the Queen's Bench for a *mandamus* on the Bank to transfer.

Motion rejected.

1861.

January 16.

In the Goods of WILLIAM WALKER FELL (deceased), on Motion.

In the Goods of WILLIAM WALKER FELL.

Administration.—Intermeddling with Estate through mistake. —Widow.—Form of Renunciation.—Practice.

On a proxy of renunciation and consent being filed by the widow, which omitted, however, the usual declaration that she had not intermeddled in the estate of the deceased (she having intermeddled therein through mistake), the Court granted administration to the natural and lawful father of the deceased.

William Walker Fell, late of No. 8, Camden Street, in the parish of St. Pancras, died on the 3rd of May, 1860, leaving Sarah Fell, his widow, and Mr. John Fell his natural and lawful father (the only persons entitled in distribution to his personal effects), him surviving.

The deceased left behind him a testamentary paper dated the 2nd of May, 1860, of which he appointed his wife and Mr. King executors.

The Court on motion refused to grant probate of this paper, on the ground of its having been unduly executed.

The widow was anxious that the deceased's father should take out administration to the estate. She had executed a proxy of renunciation and consent. She was however, unable to execute a renunciation in the usual form, which contains a recital that the renunciant has not intermeddled in the estate of the deceased, inasmuch as she had intermeddled on the supposition that she was an executor, and had a right to do so.

Robert Pritchard moved for a grant of administration of the estate of the deceased to be decreed to Mr. John Fell, as his natural and lawful father. The widow was generally preferred; but if she waived her right, the next of kin might come in and take the grant. The only objection here was,

1861.
January 16.

In the Goods of WILLIAM WALKER FELL.

that she had intermeddled in the estate, and so could not renounce in the usual form. If an executor intermeddled in the estate, the Court would not allow him to renounce, but compel him to take probate.

SIR C. CRESSWELL: But if a person entitled to the grant has intermeddled in the estate, can the Court compel him to take out administration?

Robert Pritchard: No; I suppose not. The administrator is merely an officer of the Court.

SIR C. CRESSWELL: I think you may take the grant. Mrs. Fell may renounce without declaring that she has not intermeddled in the estate. There is no doubt that she intermeddled on the supposition that she herself was one of the executors.

Motion granted.

In the Goods of ANNE HILL RYDER (deceased), on Motion. Jan. 23 & 30.

Will.—Directions to nominate Executor.—Self-appointment.

In the Goods of ANNE HILL RYDER.

A. B. made her will, concluding "I must beg C. D. to appoint some one to see this my will executed." And the Court granted probate to C. D. on his appointment of himself being filed in the Registry.

In this case Anne Hill Ryder made her will on the 23rd of September, 1856, partly written and partly printed; the formal appointment of executor towards the beginning of the paper was left in blank; and at the end was written, "I must beg Edmund S. P. Calvert, Esq., to appoint some one to see this my will executed."

1861. Jan. 23 & 30.

In the Goods of ANNE HILL RYDER.

Under the circumstances of the deceased's family and property, it was convenient that Mr. Calvert should act as executor, and an appointment of him by himself as executor was filed in the Registry.

Dr. Swabey moved the Court to grant probate to Mr. Calvert as executor so appointed. There is authority for granting probate to persons nominated by those authorized by the testator so to nominate (*In the goods of Cringan*, 1 Hagg. 548; *Jackson and Gill* v. *Paulet*, 2 Rob. 345); but no direct authority for granting probate to the person so authorized on his having appointed himself.

SIR C. CRESSWELL: Let the motion stand over, and see whether you can find any authority or support from the practice in Chancery in analogous matters, *e.g.* appointment of trustees.

January 30.

Dr. Swabey renewed the motion, and submitted that as far as he could ascertain the principles of equity applicable to the circumstances, general powers may either include or exclude the individuals to whom they are given; a power to appoint to such person or persons as the appointor may think fit, includes the appointor himself; and instances are constantly occurring in practice in which under such a power a person appoints to himself. So under the ordinary uses to bar dower, a purchaser may appoint the estates to himself. No authority can be wanting on this point, as it is of daily practice with conveyancers. If, therefore, the power in this instance had been 'to appoint some one to take my property,' Mr. Calvert could, beyond question, have appointed this to himself. . . . . Now here the words are of the most comprehensive kind: 'I must beg Mr. S. P. Calvert to appoint some one' (*i.e.* any one, and not any other person) 'to see this my will executed.' Mr. Calvert himself, therefore, is within the words

employed, and could clearly nominate himself, unless there were some legal restraint or impediment arising out of the office to which the appointment relates. 1861. Jan. 23 & 30. In the Goods of ANNE HILL RYDER.

SIR C. CRESSWELL: I think the grant may go to Mr. Calvert as prayed.

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sed Theobald 3 Rob 571

In the Goods of ROBERT MORRISON, the Elder (deceased), on Motion. February 6. In the Goods of ROBERT MORRISON.

Administration de bonis non.—*Executor.*—*Residuary Legatee.* —*Practice.*

B. appointed C. and D. executors and residuary legatees in trust, his widow residuary legatee for life or widowhood, and C., D., E., F., and G. substituted residuary legatees. C. and D. renounced probate and administration as executors and residuary legatees in trust, and letters of administration with the will annexed were granted to the widow; she died, leaving part of the estate unadministered. The Court refused to allow C. to retract his renunciation as residuary legatee in trust, but granted him administration *de bonis non* as substituted residuary legatee.

In this case the deceased Robert Morrison died in September, 1856, having made his will, and therein appointed his sons George and John Morrison executors and residuary legatees in trust, his wife Eleanor Morrison residuary legatee for life or widowhood, and upon her death or marriage substituted the above-named George and John Morrison, and three other sons, residuary legatees. George and John Morrison renounced probate and administration with the will annexed, as executors and residuary legatees in trust, and in October,

1860. February 6.

In the Goods of ROBERT MORRISON.

1856, administration with the will annexed was granted by the Consistorial Court of Durham to the widow, as residuary legatee for life or widowhood; she intermeddled with the deceased's personal estate, and died in August, 1860, leaving part thereof unadministered. It was desirable that a grant of the unadministered goods should be made to John Morrison, and the question was, in what capacity he could take the grant, whether by retracting his renunciation as residuary legatee in trust, or as substituted residuary legatee beneficially interested, in which latter character he had never renounced.

Dr. Deane, Q.C, moved the Court. If the Court is of opinion that the rule acted upon (*In the Goods of Samuel Richardson*, 1 Swab. & Trist. 515), applies to the circumstances of this case, I submit that John Morrison is entitled as beneficial residuary legatee substituted.

SIR C. CRESSWELL: I am of opinion that the rule acted upon in the case you have referred to does apply to the circumstances of this case. Great inconvenience would result from allowing a person to take a grant in an inferior character, who had once, and at the same period, been entitled in a superior character. But I think John Morrison may take the grant as beneficial residuary legatee substituted. He never renounced in that character; it did not actually exist when the renunciation was made.

1861.
February 6.

DEPIT AND CHAPOT v. DELERIELEUSE.

DEPIT AND CHAPOT v. DELERIELEUSE

Bankruptcy of Domiciled Frenchman.—Sale of Debts by Assignee.—Application for Administration to Purchaser of a Debt due from a Resident in London.

D. died in Paris, intestate and insolvent, in February, 1859. On petition of his widow the Tribunal of Commerce of the Seine, in October, 1859, declared the estate bankrupt, and appointed B. assignee, who, under a further decree, proceeded to sell the debts due to D.'s estate by auction. C. purchased the debts, among which was one due from F. of Lombard Street, London. By the law of France, C. would be entitled to sue there for the recovery of such debts in his own name. On motion to grant administration to the attorney of C. of D.'s estate, limited to the debt due from F., on the suggestion that a personal representative of D. was necessary to sue in this country for the debt due from F., the Court rejected such motion.

SEMBLE, first, the title to the debt vested in C. by the law of France would enable him to maintain a suit in this country.

Secondly, there is no authority for granting administration to the purchaser of any part of the deceased's estate after his death.

In this case, Antoine Ferdinand Delerieleuse, of Rue Montmartre, in the city of Paris, agent in silk, deceased, died on the 5th of February, 1859, intestate and insolvent. He left him surviving Julia his widow and an infant daughter, the only persons entitled to his personal estate. On the 20th of October, 1859, Madame Delerieleuse filed a petition in the Tribunal of Commerce of the Seine, praying that the estate of the said deceased might be duly administered by the said Tribunal. On the same day the Tribunal of Commerce, by a decree, declared the estate bankrupt, and appointed Mons. Le François syndic and official assignee. By a further decree of 7th of March, 1860, Mons. Le François was authorized to proceed to a disposal of the debts due and owing to the estate of the said deceased; and pursuant thereto, on the 23rd of March, 1860, the debts were sold by auction at Paris to

1861. February 6.

DEPIT AND CHAPOT v. DELERIELEUSE

Mons. Maurice Chatain, as agent for Messrs. Depit and Chapot, of Romdus, Drome, bankers. Amongst the debts thus sold was one due from Mons. Kammare, of 79, Lombard Street, London, amounting to 11,115 francs (£444. 12*s.*), with interest thereon. A *procès-verbal* of this procedure, signed by Messrs. Delaporte and Prevost, the notaries engaged in the sale, was duly registered at Paris on the 24th of March, 1860, and a copy thereof was as usual delivered to Messrs. Depit and Chapot, which copy was before the Court. The widow and child, in the presence of the mother, were cited personally, and did not appear. Mons. Edouard Foulon, of No. 45, Rue Recties, Paris, an avoué and notaire of twenty years' standing, and particularly conversant with matters of bankruptcy, stated in affidavit that these proceedings had been had in entire accordance with the French law; that by the decree of the 20th of October, 1859, the estate of the deceased vested in the syndic Mons. Le François; and that by the subsequent sale of the said debts they vested in and were the absolute property of the purchaser thereof; by such purchase the title of assignee or syndic to the same vested in the said purchasers, together with the right to maintain any action at law or other process necessary for the recovery of the same, and that the law of France sanctions the maintenance of such process by and in the names of the purchasers; that no other judicial act, save and except the assignment of such debts as set forth in the *procès-verbal* is necessary to complete the title to the debts, and the right of the purchasers to recover them, suing in their own names; that no letters of administration are at any period of the proceedings as aforesaid necessary or required by the French Law, and that such letters are unknown to the law of France.

Dr. Middleton moved the Court to decree letters of administration to the attorney of the Messrs. Depit and Chapot, limited to the said debt of £444. 12*s.*, and the interest due thereon.

A personal representative was necessary in order to sue in this country for the debt. By the 19th section of the Court of Probate Act, 1858, the personal property of the intestate in this country would vest in the Judge of the Court of Probate. He cited *Almes* v. *Almes*, 2 Hagg. 155, Ap.; and *Baynes* v. *Harrison*, Deane, 15.

SIR C. CRESSWELL: What assistance do you want from me? Your own statement is, that the title of the purchasers of this debt from the syndic or assignee is good by the French bankruptcy law. If it had been the case of an ordinary bankruptcy in France, and an assignment had been made of all the bankrupt's estate, the assignee could have sued in this country for a debt due to the estate. In the present case the bankruptcy took place after the death of the bankrupt, a proceeding unknown to our law; but if, as your affidavit states, your clients are by French law entitled to sue for the debts in France, why should they not do so in this country?[1] Again, is there any case where a person who has purchased part of the deceased's property after his death has been held entitled to be a representative? *Baynes* v. *Harrison* is rather against you on that point. I must reject this motion.

In the Goods of ELIZABETH GODFREY (deceased), on Motion.

February 13.

In the Goods of ELIZABETH GODFREY.

Mortgage of an Interest under a Will.—Administration to Mortgagee.

E. G. being a married woman, and having an interest under her father's will expectant on the death of his widow, joined with her husband in 1841 in executing a mortgage of such interest to B., to secure a running

[1] Case of *Odwin* v. *Forbes*, by J. Henry. London, 1823.

1861.
February 13.

In the Goods of ELIZABETH GODFREY.

account. E. G. died in 1851, and her husband in 1853, neither possessed of any other property. On the death of her father's widow, a representative to E. G. was required to release the trustees. B.'s debt being larger than the amount of E. G.'s interest under the will, the Court granted administration to the goods of E. G. to B.

In 1841, Elizabeth Godfrey, wife of Robert Godfrey, being entitled to a legacy and a share of the residue under the will of her father, Thomas Patchett, payable on the decease of his wife, Mr. and Mrs. Godfrey, by deed dated the 27th of September, 1841, assigned all their interest under the said will to Messrs. Brown and Barrow, to secure a running account not exceeding £300, with powers of attorney, sale, etc.

Elizabeth Godfrey died in June, 1851. Robert Godfrey died in October, 1853, a convict. In 1843 the mortgage of the 27th of September, 1841, became the sole property of Brown, and an amount exceeding £300 was due thereon. Mrs. Patchett died about two and a half years ago, and the proceeds of the legacy and share were ascertained to be about £197. Elizabeth and Robert Godfrey left three children, a son and two daughters; neither left any property, and no benefit could accrue to their estate from the mortgaged fund.

The trustees of Mr. Patchett's will required administration to be taken to Mrs. Godfrey, and that such administrators should join with Brown in their release.

The Queen's Proctor refused to interfere.

Dr. Spinks moved the Court on the above facts to grant administration to Brown alone, under the 73rd section of the Probate Act.

SIR C. CRESSWELL: I do not see that we need have recourse to the 73rd section. I think Brown may take the grant as mortgagee of the fund.

1861.
March 20.

In the Goods of MARIA BAILEY (wife of HENRY WOODROFFE BAILEY, deceased), on Motion.

In the Goods of MARIA BAILEY.

Will of Married Woman.—Husband surviving.—No Executor.

Where a married woman makes a will and appoints no executor, the persons interested under the will are entitled to the grant in priority to the husband, who can only obtain the grant on their renunciation being filed in the registry.

Maria Bailey died on the 16th September, 1859, leaving the said H. W. Bailey, her lawful husband, her surviving. During her coverture, in pursuance of certain powers vested in her under the will of her late father, Robert Harding, the deceased made her last will and testament, bearing date the 31st of March, 1833, but appointed no executor thereof. By it she appointed and bequeathed two sums of £1000 and £500, over which her power of appointment extended, to the trustees of a certain indenture of settlement made upon the marriage of her daughter, Maria H. Bailey, with Richard Pugh, upon the trusts of the same indenture of settlement, in substitution, *pro tanto*, for the fund settled by the said indenture, and in part satisfaction of the liability of her husband under the covenants on his part contained in the said indenture of settlement. There was also a small sum of interest due at the death of the deceased, over which she had no disposing power.

The legatees had by letter declined applying for letters of administration with the will annexed.

Dr. Spinks now moved the Court to grant letters of administration with the will annexed to the husband of the deceased, as the person really interested under the will. The appointment is in substitution of his covenant under the daughter's marriage settlement; and if the grant is not made in this way, it may necessitate a *cæterorum* grant in respect

1861. March 20.

of the small amount of interest due, to which the husband is entitled.

In the Goods of MARIA BAILEY.

SIR C. CRESSWELL: I think not. The persons at present entitled to the annuity or the principal sum of £1500, viz. the trustees of the daughter's settlement, have the real interest. The effect it may have as regards the husband of the deceased is merely collateral. The practice in the registry, with respect to the right of administration with the will annexed in the case of married women, seems never to have been satisfactorily settled; but I understand that, since Dr. Lushington's judgment in *Brenchley* v. *Lynn*, 2 Rob. 469, the practice has been to let the grant follow the interest. It probably does not matter which rule is adopted; but it is desirable that one rule only should prevail, and I shall follow the course that has been adopted since that judgment. In the present case the grant can only be made to the husband on the legatees filing their renunciation in the registry.

April 16.

ONSLOW AND ALLARDICE *v.* CANNON.

ONSLOW AND ALLARDICE v. CANNON.

Execution of Will by Law of Scotland.—Practice.—Costs.

The next of kin opposed a will executed in the Mysore territory in the East Indies, on the ground that the testator was a domiciled Scotsman, and that the execution was invalid by the law of Scotland. Pending the suit, a court of appeal in Scotland, in another case, determined that the will of a domiciled Scotsman as to personalty was good if executed according to the *lex loci actus*. The next of kin gave notice to the plaintiffs that they no longer intended to dispute probate; and when the cause came on for hearing asked for their costs out of the estate; but the Court refused to make any order for costs, on the ground that they had raised an issue of fact as to domicil likely to put the plaintiffs to great expense, as well as the issue at law.

William Campbell Onslow and William Patrick Allardice,

1861.
April 6.

ONSLOW AND ALLARDICE v. CANNON.

by John Irving Glennie, their proctor, having warned the Rev. Francis Cannon (clerk) to appear and support any interest he might have in the estate of Thomas Cannon, late of Wastarah, in the Mysore territory in the East Indies, coffee-planter, deceased, who died on the 12th of March, 1860, at Wastarah aforesaid, the said Rev. Francis Cannon appeared by John Wilson Nicholson, his attorney; whereupon John Irving Glennie delivered his declaration to the said John Wilson Nicholson in the words and figures following:—

"In Her Majesty's Court of Probate.

"The 20th day of November, 1860.

"William Campbell Onslow and William Patrick Allardice, "by John Irving Glennie, their proctor, say that Thomas "Cannon, late of Wastarah, in the Mysore territory in the "East Indies, coffee-planter, who died on the 12th day of "March, 1860, at Wastarah, made his last will and testa- "ment, bearing date the 21st day of October, 1859, and in "the said will appointed the said William Campbell Onslow "and William Patrick Allardice executors; that the said will, "after having been reduced into writing, was signed by the "said testator in the presence of two witnesses present at the "same time, and who subscribed the same in the presence of "the said testator, and whose names severally appear upon "the said will; and the said testator was at the time of the "execution of the said will of perfect sound mind, memory, "and understanding."

Whereupon the said John Wilson Nicholson delivered to the said John Irving Glennie his plea, in the words and figures following:—

"The defendant, by John Wilson Nicholson, his attorney, "says that the said Thomas Cannon, at the time of making "the supposed will, and from thence until and at the time of "his death, was domiciled in Scotland; and the defendant "further says that the said will was not made and executed in "conformity with nor in the manner and form required to

1861. April 16.

ONSLOW AND ALLARDICE v. CANNON.

"render the same valid by the law of Scotland in that behalf "then and still in force."

Whereupon the said John Irving Glennie delivered to the said John Wilson Nicholson his answer, in the words and figures following:—

"1. The plaintiffs, William Campbell Onslow and William "Patrick Allardice, by John Irving Glennie their proctor, "say, that Thomas Cannon, the deceased, in this cause, at the "time of making his said will, and at the time of his death, "was not domiciled in Scotland, but in Wastarah, in the "Mysore territory in the East Indies, and that the said will "was made and executed in conformity with and in manner "and form required by the law in force in the Mysore ter-"ritory.

"2. That for a further answer, the plaintiffs by their afore-"said proctor say, that the said will was made and executed "in the manner and form which render it valid according to "the law of Scotland, if the said Thomas Cannon was at the "time of the making the said will and at the time of his "death domiciled in Scotland."

Whereupon issue was joined, and the Judge ordered the cause to be heard by oral evidence before the Court itself.

Dr. Phillimore, Q.C. (*Mr. Mundell* with him), for the plaintiffs, now moved for probate. He understood the opposition to this will was withdrawn.

Dr. Deane, Q.C. (*Mr. J. A. Russell* with him), for the defendants. In consequence of a recent decision in a court of appeal in Scotland, after a deliberation of some months by the learned judges, the defendants have thought it right to abstain from offering any further opposition to probate being taken in this case. In *Purvis's Trustees* v. *Purvis's Executors*, on the 11th of March in the present year, the opinions of the consulted judges determined that a will of personalty executed

by a domiciled Scotsman abroad is valid, if executed according to the *lex loci actus*;[1] thus, if in the present case we had established a Scotch domicil, it would not have invalidated the will being executed in accordance with the law of the place where it was actually made. But, as the law has been so recently settled in Scotland, we submit that the defendants are entitled to their costs out of the estate.

Dr. Phillimore, Q.C., opposed the defendants' costs out of the estate, but did not ask to condemn them in costs.

SIR C. CRESSWELL: If the defendants had raised merely a point of law, they might have had some ground for asking for their costs; but, here, they chose to raise the question of domicil, which was likely to put the plaintiffs to great expense. Under these circumstances I shall make no order as to costs.

In the Goods of ELEANOR BURCH (deceased).

May 1 and 8.

In the Goods of ELEANOR BURCH.

Administration.—Practice.—Attorney.—Person entitled to grant resident in England.

Where the person solely entitled to a grant of administration was resident in this country, and able to take it himself, the Court declined to decree it to his attorney for his use and benefit.

Eleanor Burch, wife of James Burch (formerly Eleanor Briten, widow), died on the 6th of July, 1859, intestate, leaving her husband her surviving. By her former husband she

[1] See 24 & 25 Vict. c. 94, "An act to amend the law with respect to wills of personal estate made by British subjects," and 24 & 25 Vict. c. 121, as to domicil of British subjects dying abroad in relation to wills.

1861. May 1 and 8.

In the Goods of ELEANOR BURCH.

had an only child, Franklin J. H. Briten, who survived his father, but died in her lifetime, a bachelor and intestate, leaving her his sole next of kin, and the only person entitled in distribution to his personal estate, and who was supposed to have taken a vested interest under the will and codicil of John Dodd, in a portion of the residuary personal estate of the said John Dodd. The opinion of the Court of Chancery was about to be taken in respect of the construction of the residuary clauses of the said will and codicil, and for that purpose it was necessary that there should be representations (none having heretofore been taken out) to the personal effects of the said Franklin J. H. Briten, as well as of the said Eleanor Burch.

James Burch was unwilling to take out himself a grant of administration for the purpose of representing his deceased wife or her son, but was anxious that both grants should be made to Mr. Charles Cockell, his solicitor. He had according filed a renunciation of his rights to a grant of administration of the effects of his wife, and a consent to the same being granted to Mr. C. Cockell.

Dr. Tristram moved the Court to decree letters of administration of the personal effects of the said Eleanor Burch, to be granted to Mr. Charles Cockell, as the attorney of, and for the use and benefit of James Birch.

SIR C. CRESSWELL: It is the practice of the Court to grant administration to the attorney of a person entitled to the grant, and who is absent from this country; but can you cite any authority for giving the grant to the attorney of a person who is in the country, and able but unwilling to take it himself?

Dr. Tristram: There is no authority precisely in point (see 1 Wms. on Exors. 5th edit. 383). *In the goods of Sarah Hannah Roberts* (*ante*, Vol. I. p. 64), the Court granted administration to the nephew of the party entitled, who was of an ad-

vanced age, and unwilling to take upon himself the burden of administration. The husband here is entitled to the whole of the property, and is the only person concerned. Why should he not be allowed to nominate some one to act for him in the matter? The grant might be made under the 73rd section of the Probate Act. 1861. May 1 and 8. In the Goods of ELEANOR BURCH.

SIR C. CRESSWELL: I have an objection to departing from the practice of the Registry. The 73rd section is, I think, inapplicable to this case. *Cur. adv. vult.*

SIR C. CRESSWELL: I directed a search to be made in the Registry, and am informed that no case can be found where an administration has been granted to A. B. for the use of C. D. when C. D. was within the jurisdiction of the Court, and able to take the grant. I have an objection to creating a new precedent, and must reject the motion. May 8.

Motion rejected.

In the Goods of JOSEPH GOODENOUGH (deceased).

May 1.

In the Goods of JOSEPH GOODENOUGH.

Wills.—Revocation and Destruction of earlier one.—Reference to by subsequent Codicil.

Where there is a distinct reference in a subsequent codicil to a revoked and destroyed will of an earlier date, as "my last will of such a date," parol evidence cannot be admitted to show that the reference was by mistake, and that the testator intended a will of a later date to operate. Probate of such later will refused.

The deceased in this case made a will, dated the 30th of June, 1858, and thereof appointed George Rogers and George James Andrews executors.

1861. May 1.

In the Goods of JOSEPH GOODENOUGH.

On the 15th of April, 1859, he duly executed another will, whereby, among other things, he revoked all former and other wills, and whereof he appointed his son Stephen Goodenough and the above-named George Rogers and George James Andrews executors. Upon the execution of this will, the will of June, 1858, was by his direction destroyed by burning.

On the 2nd of February, 1860, the testator executed a codicil written by himself, and commencing with these words,—"It is my wish that this should be added as a codicil to my "last will made 30th June, 1858." By this codicil the testator disposed of certain specific legacies.

The testator died on the 30th of November, 1860.

On an affidavit of George James Andrews of declarations of the deceased previous to and after the date of the codicil, tending to show that the reference in it to the will of 1858 was a mistake:

Dr. Spinks moved the Court for probate of the will of 1859 and of the codicil of 1860.

SIR C. CRESSWELL: I cannot consider the evidence of Mr. Andrews as to the testator's declarations and intentions. If the substance of the codicil had been connected with, or referred to the will of 1859, I should have thought that the reference to that of 1858 was unintentional, but it in no way refers to it. I cannot grant probate of the will of 1859.

Probate of the will of 1859 *refused.*[1]

[1] See *In the goods of William Chapman*, 1 Rob. 1.

1861.
May 24 and July 11.

SMETHURST v. TOMLIN AND BANKES (on Demurrer).

SMETHURST v. TOMLIN AND BANKES.

Will.—Executor.—Conviction of Felony.—Title to Probate.

A person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in a Court of Probate with a view of establishing the validity of the will by which he is appointed executor.

This was a petition arising on demurrer to the defendant's plea. The plaintiff, by his declaration dated the 31st of May, 1860, propounded the last will and testament of Isabella Bankes, who died on or about the 3rd of May, 1859, the said will bearing date the 1st of May, 1859, and the plaintiff being thereof appointed sole executor.

The defendants pleaded several pleas, and among them the following:—

That the alleged will is in the words and figures following:—"This is the last will and testament of me Isabella Bankes, "now residing at No. 10, Alma Villas, Richmond, in the "county of Surrey, spinster. I give and bequeath to my be-"loved friend, Miss Jenkins, of Walthamstow, Essex, my "brooch, set with brilliants and pearls, and containing the "hair of my late father. And as to all my real and personal "property, estate and effects whatsoever and wheresoever, and "of what nature or kind soever the same may be, I give, de-"vise, and bequeath the same unto my sincere and beloved "friend Thomas Smethurst, doctor of medicine, now also of "No. 10, Alma Villas, Richmond, aforesaid, for his own use "absolutely for ever; and I hereby appoint the said Thomas "Smethurst sole executor of this my will, and hereby revoking "all former wills or testamentary dispositions at any time here-"tofore by me made, do declare this only to be my last will and "testament, as witness the hand of me the said Isabella Bankes, "the 1st day of May, 1859." And that after the alleged execution of the said will, and after the decease of the said Isa-

1861.
May 24 and July 11.

SMETHURST v. TOMLIN AND BANKES.

bella Bankes, the plaintiff was in due form of law convicted of a certain felony, to wit, on the 30th day of November, in the year of our Lord 1859, and thereupon sentenced to one year's imprisonment, which said conviction still remains unreversed and in full force, and under which the said plaintiff was at the time of his preferring this suit undergoing imprisonment. And the defendants further say that after the death of the said Isabella Bankes, and after the commencement of this suit, by a certain instrument bearing date the 23rd day of November, 1860, and under the hand and seal of Anne Catherine Elizabeth Jenkins, being the said Miss Jenkins in the said will mentioned, the said A. C. E. Jenkins renounced the brooch thereby to her alleged to have been devised, and released the said plaintiff from all claims and liabilities in respect of the said alleged bequest.

Demurrer to this plea on the ground that the plaintiff's title to probate of the will of the said Isabella Bankes, as the executor therein named, is not in any way affected by the will set out and the facts alleged in the said fourth plea.

Joinder in demurrer.

Dr. Phillimore, Q.C. (*Dr. Swabey* with him) now argued in support of the demurrer.—In Williams's Executors, the principle is laid down at p. 204 of the 5th edition in the following words:—"There are few or none who by our law are disabled, "on account of their crimes, from being executors; and there- "fore it has always been holden that persons attainted or "outlawed may sue as executors, because they sue *in auter "droit*, and for the benefit of the party deceased. By the "civil and common law, indeed, not only traitors and felons, "but heretics, apostates, usurers, famous libellers, incestuous "bastards, and many others, are incapable of being executors." Comparing this passage with the same learned author's accounts of those who are incapable of being administrators at p. 390, "the incapacities of an administrator not only extend to those

"persons who have already been enunciated as disqualified for "the office of executors, as *non compotes mentis*, popish recu- "sants, convicts, persons denying the Christian religion to be "true, but comprise attainder of treason or felony, or other "lawful disability, outlawry and bankruptcy," it would seem beyond doubt that a felon is not disabled to be an executor. So Co. Lit. s. 197: "The second is where a man is "outlawed upon an action of debt or trespass, or upon any "other other action or indictment, etc. But these general "words receive a distinction, viz. if an executor or adminis- "trator sueth any action, outlawry in the plaintiff shall not "disable him, because the suit is *in auter droit*, that is, in the "right of the testator and not in his own right." If it is said that these statements and the cases cited in the notes of Williams on executors are consistent with the fact of an executor obtaining probate, afterwards becoming a felon, and then not being disenabled to sue, but do not extend to the present case, where a person asks probate as executor, being at the time a felon, it may be answered that the principle of the one case is applicable to the other. The character of executor is distinct from the personal civil *status* of the man; he is the choice and creature of the testator, and, as such, asks for probate; if in that character he can sue in spite of a subsequent felony, why is he not capable of taking probate? *Primâ facie*, the Ordinary is bound to grant probate to the person named by the testator; it will be for the other side to show that in any case such an application has been refused.

BY THE COURT: There is one matter not yet noticed. The plea states the release to the plaintiff of a specific legacy. This must assume that he is capable of taking a release.

Dr. Deane, Q.C. (*Serjt. Ballantine* and *Mr. C. G. Merewether* with him,) in support of the plea: In all the cases cited probate has been granted before the felony. No case can be

1861.
May 24 and July 11.
SMETHURST v. TOMLIN AND BANKES.

shown in which a felon has applied for and obtained probate. In certain cases of physical incapacity the Ordinary may set aside the person nominated by the testator to be executor (*Evans* v. *Tyler*, 2 Rob. 128): why may not a similar discretion be exercised in such circumstances as the present?

Dr. Phillimore in reply. *Cur. adv. vult.*

July 11.

SIR C. CRESSWELL, after stating the substance of the pleadings, said:—The contents of the will and the release of the specific legacy may at once be set aside as having nothing to do with the real question, as to which there is but little to be found in our books. The authorities, however, clearly establish these points:—

First, that where a will has been made and an executor appointed, the Ordinary cannot exercise any discretion as to granting or refusing probate. If he refuses probate, it must be on the ground of some legal disability, recognized and allowed by the common law, and not by the Canon law only.

Secondly, that an executor who has obtained probate, notwithstanding a conviction of felony, and notwithstanding outlawry or attainder, may continue to act as executor, and maintain actions and exercise all other rights of an executor. This shows that the office of executor is not forfeited; and if his testator were himself an executor, he would represent him in that capacity.

The only question upon which doubt can be entertained is, whether an executor, having been convicted of felony after the death of the testator, is in a condition to ask for probate. His rights are derived from the will and not from the probate. Before probate he is in possession of all the testator's goods, and may bring trover or detinue; but for such things as lie in action, although he may commence he cannot maintain an action before probate. He may before probate pay debts, and

receive or release debts. His office, then, not being forfeited, and his right to exercise the functions of an executor remaining unimpaired, notwithstanding an attainder, it is difficult to find any satisfactory reason why the party so entitled should not be allowed to perfect his title as executor, by proving that the testator duly executed the will by which he was appointed.

I find no authority for saying that he shall not be admitted to prove the will. In Swinburne, pt. 5, s. 4, it is said: "Whosoever is convicted of treason or felony, as he cannot make a "testament or last will, as is before confirmed, no more is he "capable of anything disposed of by testament or last will. "But if a man being attainted of felony be admitted to his "clergy, I suppose that he lawfully may be an executor." By a note it appears that a felon, not admitted to his clergy, being condemned to death, was considered as dead, and therefore incapable of being an executor, a reason which is no longer applicable to the subject.

I am for these reasons of opinion that the present plaintiff, having been appointed executor, his office being *in auter droit*, was not forfeited by the conviction of felony; that he is still entitled to exercise the rights of an executor, and that he has a right to perfect his title by proving in this Court the due execution of the will by which he was appointed. I must allow the demurrer.

In the Goods of JOHN MOSS WINN (deceased).

July 8 and 11.

In the Goods of JOHN MOSS WINN.

Will.—Condition precedent.—Evidence.

Where a will is expressed to take effect during absence on a particular voyage, and the writer returns to England, the Court cannot admit parol evidence to show the writer's intention of adhering to that will during a subsequent absence.

John Moss Winn duly executed a testamentary paper bear-

1861. July 8 and 11.

In the Goods of JOHN MOSS WINN.

ing date the 18th of December, 1849, commencing in the following words:—"Be it known unto all men that I, John "Moss Winn, of Birkenhead, in the county of Chester, formerly "a bookkeeper, but now out of business, being on the eve of "embarking for San Francisco, South America, or Mexico, do "hereby, in the case of my decease during my absence being "fully ascertained and proved, do and will over the whole of "my furniture, etc., or any property of whatsoever descrip-"tion," for the joint support of his wife and children during the wife's widowhood, and in case of her second marriage for the children, and appointed his brother William Henry Winn and a Mr. M'Culloch, executors.

John Moss Winn sailed for San Francisco in January 1850, the will being deposited with his brother. He returned to England in June 1852, and William Winchester, who was one of the attesting witnesses of the will, deposed that during John Moss Winn's stay in England, he frequently mentioned to the deponent that he intended the will made by him on the 18th of December, 1849, prior to his going to San Francisco, and which was then deposited with his brother William, to continue in force in case of his death during the time he should be away on a voyage he then intended to make to Australia.

In July 1852, Winn left England for Australia, and the last thing which had been heard of him was a letter from him received by his wife, which bore date the 11th of September, 1853. Thus, in the end of 1860, the presumption of law arose that he was dead. William Winn died in August 1852, and the paper in question was found among his papers by his executor, who handed it to M'Culloch, who renounced the executorship, and the widow now asked for letters of administration with the will annexed.

Dr. Swabey moved accordingly: He cited Sir John Nicholl's remarks in *Strauss* v. *Schmidt*, 3 Phill. 217: "Courts, how-"ever, are cautious how they construe conditions of this sort.

1861.
July 8 and 11.

In the Goods of JOHN MOSS WINN.

"I have looked whether it is an absolute condition, or depen-
"dent on any particular motive operating at the time. It does
"not say it is to take place only in the event of his dying.
"If on the return of the deceased in 1802, by subsequent acts,
"he has recognized these papers, I should not hold his return
"to be such a defeasance as to invalidate the will."

SIR C. CRESSWELL: In the present case the condition seems absolutely a condition precedent. Again, can I, since the Wills Act, admit evidence of such declarations of the deceased as are now before me? Would it not be making a will by word of mouth? You had better consider this point.

July 11.

Dr. Swabey, referring to *Parsons* v. *Lanoe*, 1 Ves. sen. 190, said that in that case Lord Hardwicke held similar words, "If I die before my return from my journey to Ireland," to be an absolute condition, and, under the Statute of Frauds, considered that he was not at liberty to admit parol evidence to show adherence after the return from Ireland. Thus, unless the Court can in the present case disconnect the words "during my absence" from the "San Francisco or "Mexico," it would seem that *Parsons* v. *Lanoe* must govern it.

SIR C. CRESSWELL: I am afraid it must be so. The Court is unwilling by reason of such expressions to set aside testamentary papers, which probably contain the deceased's intentions, but the present words are too clear to admit of any doubt as to their legal construction.

Motion refused.

1861.
March 20 and 27 and April 24.

HAWARDEN v. DUNLOP.

HAWARDEN v. DUNLOP.

Citation on alleged Executor to prove Will.—Motion to stay Proceedings.—Lis alibi pendens.—Motion to raise question of Domicil.—Practice.

It is no stay of proceedings in a testamentary suit commenced by the next of kin in this Court, that the defendant, the alleged executor of a will, has filed a petition in a commissary court in Scotland, to obtain confirmation of the same instrument.

When an alleged executor is cited by the next of kin to prove a will, and has appeared, he cannot try the question of the domicil of the alleged testator before propounding the will.

This was a question arising out of a testamentary suit commenced by a citation, dated the 8th of February, 1861, taken out on behalf of Viscountess Hawarden, reciting that John Fleeming Baron Elphinstone, in the peerage of Scotland, late of Bournemouth, in the county of Hants, died on the 13th of January, 1861, a bachelor, without a father, leaving his mother (now Mrs. Katon), and Lady Hawarden, one of his sisters and one of the persons entitled in distribution in case he died intestate, him surviving, and calling upon George Dunlop, of Edinburgh, to appear and propound a paper writing alleged to have been executed by Lord Elphinstone on the 13th of February, 1854, as a will or *mortis causâ* disposition and settlement in the Scotch form, in which George Dunlop was sole executor and universal legatee.

Dr. Phillimore, Q.C. (*Mr. C. E. Coleridge* with him), on behalf of the defendant, Mr. Dunlop, now moved the Court to order proceedings in this court to be stayed, on the ground that a petition had been presented on the 28th of January, by Mr. Dunlop, with a view of proving this will, to the Commissary of Dumbartonshire. Mrs. Bontine, another sister of the deceased, had entered a caveat in that court, and Lady

1861.
March 20 & 27 and April 24.

HAWARDEN v. DUNLOP.

Hawarden had appeared as an objector. It is necessary to call attention to the Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56). Section 9 enacts, "That from and after "the date aforesaid, it shall be competent to include in "the inventory of the personal estate and effects of any "person who shall die domiciled in Scotland, any personal "estate or effects of the deceased, situated in England or "Ireland, or both; provided that the person applying for con- "firmation shall satisfy the commissary, and the commissary "shall, by his interlocutor, find that the deceased died domi- "ciled in Scotland, which interlocutor shall be conclusive "evidence of the fact of domicil," etc. Section 10. "From "and after the date aforesaid, when any confirmation of an "executor of a person who shall in manner aforesaid be found "to have died domiciled in Scotland (which includes, besides "the personal estate situated in Scotland, also personal estate "situated in England), shall be produced in the principal "Court of Probate in England, and a copy thereof deposited "with the registrar, together with a certified copy of the in- "terlocutor of the commissary finding that such deceased "person died domiciled in Scotland, such confirmation shall "be sealed with the seal of the said Court, and returned to "the person producing the same, and shall thereafter have the "like force and effect in England as if a probate or letters of "administration, as the case may be, had been granted by the "said Court of Probate." We submit, a Scotch court of competent jurisdiction has seisin of the cause. It may be that the commissary court can only inquire into the formal execution of the document, and, under the sections referred to, into the question of domicil. But further questions that might arise of incapacity, undue influence, etc., would be carried before the Court of Session by a summons of reduction. Suppose the commissary in Scotland is satisfied that the Scotch domicil is made out, and the confirmation, with his interlocutor, is brought down here, the Court has

1861. March 20 & 27 and April 24. HAWARDEN v. DUNLOP.

held that it would be bound to affix its seal; that in such cases it is merely ministerial; but if the present suit goes on here, the question of domicil may be raised, and your Lordship may come to a conclusion contrary to that to which you will already have affixed your seal. At all events, it seems a matter within the discretion of the Court.

Mr. Anderson, Q.C., for the plaintiff, *contrà*: *Lis albi pendens*, to be effectual as a ground for stay of proceedings, must be *lis ad idem*; it is admitted that the jurisdiction of the Commissary Court is of a limited or inferior nature, and cannot give the same remedies in a testamentary suit that the Court of Probate can give. A summons of reduction is an independent and distinct proceeding, and is not alleged to have been taken. Again, the *lis* asserted is in a foreign country (*Cox* v. *Mitchell*, 7 C. B. (N. S.) 55). The proceedings in Scotland are taken by the person who is defendant here; he is *dominus litis* there, and may withdraw those proceedings. Why am I, who am *dominus litis* here, to be stayed from going on with this suit because there is a suit in a foreign country over which I have no control?

Dr. Phillimore in reply.

SIR C. CRESSWELL: This motion is addressed to the discretion of the Court, and I will take time to consider it, but my present impression is in favour of Mr. Anderson. It seems strange that I should refuse to the plaintiffs here the privilege of going on with their suit because one point which will probably arise in it is now in litigation in another suit in another country. I know of no principle on which I should be justified in saying that the suit should not go on. What may result afterwards is another question. *Cur. adv. vult.*

March 27. SIR C. CRESSWELL: On considering these papers, I see no

1861.
March 20 & 27 and April 24.

HAWARDEN v. DUNLOP.

April 24.

reason to change the opinion which I intimated on a previous day. This motion must be rejected, and I think with costs.

Dr. Phillimore, Q.C. (*Mr. C. E. Coleridge* with him), moved the Court to order the question of domicil to be first tried. In *De Bonneval* v. *De Bonneval*, 1 Curt. 856, the question of domicil was raised by act on petition, independently of any other question, and decided.

Mr. Anderson, Q.C., *contrà*: At all events the motion is premature. The plaintiff calls upon the defendants to propound a will if he thinks it his interest to do so, and he says, "I will propound a domicil." At present we don't know what issues are to be tried.

SIR C. CRESSWELL: I think the motion is premature. In *De Bonneval* v. *De Bonneval* the will seems to have been before the Court. In this case I think the will must be propounded.

LEWIS *v.* LEWIS (on Motion).

May 30.

LEWIS v. LEWIS.

Will.—Subscribed Witness.—Execution.

The attesting witnesses to a will, not being able to write, held the top of the pen while the writer of the will subscribed their names, and the Court held that, as the witnesses took some share in the act of writing, it could not determine on the more or less, and that the attestation and subscription were good.

This was a question arising on the mode in which the attesting witnesses' names were written to the will of Lewis Lewis. The due execution by mark of the testator in the presence of the two witnesses, John Lloyd and John Jones, was

1861. May 30.

LEWIS v. LEWIS.

deposed to by William Croft, the writer thereof, who also deposed as follows:—"I, the said William Croft, further say that the "several signatures of the said attesting witnesses to the said "will were made in the following manner; that is to say, I, the "said William Croft, wrote the name of each witness whilst "he (the witness) at the same time had hold of the pen with "which the name was being written in his hand, and that "during the whole time the signature was being so written." John Lloyd, the surviving subscribed witness, deposed:—"I, "the said John Lloyd, for myself say the statements contained "in the foregoing paragraphs of this affidavit as to the execu- "tion of this will and as to the signatures of the attesting "witnesses are quite correct; for I well remember that upon "the occasion of the execution of the said will, I and the said "John Jones, not being able to write, we requested the said "William Croft to write our names, each of us at the same "time holding the pen as his name was written."

Dr. Wambey submitted that this was a valid subscription. *In the goods of Kilher*, 6 N. C. 15, Sir Herbert Jenner rejected a motion for probate where a will was produced with the names of the attesting witnesses written in a similar manner. It appeared there, however, that the witnesses could write, and there were other circumstances of suspicion which seem to have led Sir Herbert Jenner to reject that motion, rather than the mere fact of the subscribed witnesses' names being so written.

June 12.

SIR C. CRESSWELL: In this case Dr. Wambey moved for probate. It was a question as to due execution. The attesting witnesses, who could not write, held the pen at the top, while the pen was guided to write the name. In *Harrison* v. *Elwin*, 3 Q. B. 117, the will had the names of two parties, Croft and Galor, subscribed as witnesses. Croft had written his own name, but Galor, who was called as a witness, said

that Croft held his (Galor's) hand, "and wriggled it about on "the paper." Galor could not write or read, and a jury, and subsequently the Court, held it to be a good attestation. In the present case I think the affidavits show that the party, by holding the pen, was taking some share in the act of writing, and I cannot distinguish as to quantum.

1861. May 30. LEWIS v. LEWIS.

Motion granted.

In the Goods of JAMES JONES (deceased), on Motion.

May 30 and June 5.

In the Goods of JAMES JONES.

Will.—Trustee for specific purpose.—Executor according to the tenor.

Where the whole personal property is left to a trustee on trust for a specific purpose, and no executor is named in the will, such trustee is not entitled to probate as executor according to the tenor.

SEMBLE, to constitute an executor according to the tenor, there must be words importing a general power to receive and pay what is due to and from the estate.

In this case James Jones, of the parish of Grosmont, in the county of Monmouth, labourer, left a will in the following words:—"This is the last will and testament of me, James "Jones, of Grosmont, in the county of Monmouth. I give "and bequeath to my dearly-beloved brother Thomas Jones, "all my money, notes of hand, and all securities, together "with all other effects, my property, in trust, to be equally "divided by him between himself and all others of my sur- "viving brothers. In witness whereof," etc.

Mr. Henry James now moved the Court to grant probate to Thomas Jones as executor according to the tenor. He referred to Williams on Executors, 5th edit. p. 209, and cases there cited.

1861.
May 30 and June 5.
In the Goods of JAMES JONES.

SIR C. CRESSWELL: I doubt whether the principle of any reported case reaches this. Here is a specific trust, without any general power to receive or pay. If you can find any more direct authority, the motion may be renewed.

June 12.

SIR C. CRESSWELL: This was an application for probate to a person who claimed as executor according to the tenor. The cases on the subject have proceeded on very fine distinctions. The nearest in its circumstances to the present which I can find is *Boddicott and Hamilton* v. *Dalzeel*, 2 Sir G. Lee, 294. In the judgment I find the following remark:—"I was "of opinion that there were no words in the will to make the "trustees executors. They had only power to pay what was "vested in them as trustees to the particular persons for "whose use they held it, but not a general power to receive and "pay what was due to and from the estate, which is the office "of an executor." I think that case must govern the present, and I reject the motion for probate to Thomas Jones as executor according to the tenor.

Motion rejected.

June 12.
In the Goods of ELIZA BAILEY.

In the Goods of ELIZA BAILEY, Spinster, deceased (on Motion).

Will.—Verdict of Felo de se.—*Executor.—Probate.*

The executor of the will of a person found *felo de se* by the verdict of a coroner's inquest is entitled to probate thereof, though the effect of the verdict is to work a forfeiture of the personal property of the deceased to the Crown.

There is a distinction between the operative effect of a testamentary paper and its title to probate.

In this case Eliza Bailey had made her will, dated the 9th

1861.
June 12.

In the Goods of ELIZA BAILEY.

of February, 1860. By it she left various small pecuniary legacies, and "as to the rest, residue, and remainder of my estate and effects, both real and personal, of or to which I am now or at the time of my decease may be seised, possessed, or entitled, I give, devise, and bequeath the same, and every part thereof, unto Mary, the wife of John Usher, her heirs, etc., to and for her and their own use and benefit absolutely. And I appoint the said John Usher sole executor of this my will, to whom, his heirs, executors, administrators, and assigns, I devise all estates vested in me as trustee or mortgagee, subject to the trusts and equities affecting the same respectively, and I revoke all former wills, codicils," etc. Eliza Bailey died on or about the 5th of May, 1860. A coroner's inquest was held on view of the body, and the jury returned a verdict of *felo de se*, the effect of which would be forfeiture of the goods and chattels belonging to the deceased to the Crown.

John Usher petitioned the Lords' Commissioners of her Majesty's Treasury, and on their representation, a warrant was granted by the Crown, reciting the facts of the inquest and verdict and the will, legacies and executorship, and proceeding "to give and grant unto the said John Usher all our right, title, interest, property, claim, and demand whatsoever of or belonging to the said Eliza Bailey at the time of death, to hold the same premises hereby granted unto and to the said John Usher to the intent that he the said John Usher may obtain letters of administration of the goods, chattels, and credits of or belonging to the said Eliza Bailey at the time of her death, from all or every court or courts competent or willing to grant the same, both in England or elsewhere, for the benefit of the creditors of the said deceased, and the legatees named her said will, and to be applied in such manner and with all such powers and authorities in all respects as the same would be applicable in case the same

1861. June 12.

In the Goods of ELIZA BAILEY.

"did not belong to us, and as if the said Eliza Bailey had died "possessed thereof, and without having killed herself with "malice aforethought, and as if the said will had been good "and valid, and letters of administration with the said will "annexed had thereupon been duly granted to him, the said "said John Usher, provided always that the said John "Usher shall pay stamp duty," etc. Upon application to the registry under these circumstances for probate, a difficulty was felt as to what grant should be made, and the matter now came before the Court on motion.

Dr. Swabey submitted that the executor was entitled to probate irrespective of the Queen's warrant. That might be necessary for the beneficial enjoyment of the personal property of the deceased, but did not affect the present question. There are some *dicta* in the books against the executor, as in 1 Williams on Executors (5th edit.), p. 56, after stating that traitors and felons from the time of their conviction are incapable of making testaments, "neither can a *felo de se* make a "will of goods and chattels, for they are forfeited by the act "and manner of his death, although he may make a devise of "his lands, for they are not subjected to any forfeiture; and "if (a convict felon) hath goods as executor to another, the "the same are not forfeited by conviction, whence it follows "that of such goods he may make his will." And in 4 Phillimore's Burns's Eccl. Law, 75, "If a man do willingly kill him-"self, his testament, if he make any, is void both concerning "the appointment of the executor, and also concerning the "legacy or bequest of any goods, for they are confiscate," and Swinburne, p. 106, is there referred to. But it is submitted that the principle of law is more accurately expressed in Toller's Law of Executors and Administrators, p. 11, "Nor "shall the will of a *felo de se*, so far as it respects goods and "chattels, have any operation;" and in 2 Steph. Com. (edit. 1842), p. 233, where on the capacity of persons to be testators

there is the following note:—"Blackstone also mentions conviction of treason or felony as a ground of incompetency, "but this is not properly an incapacity, it is a case of forfeiture of goods." The distinction between the operative effect of a testamentary paper and its title to probate is well established, and this Court has primarily and generally to deal with the latter only. Again, the executor may be a representative of previous testators, and entitled as under the present will, to trust properties, to deal with which probate may be necessary. There are reported cases which indirectly show that there may be an administrator or an executor of a *felo de se*. It was Lord Coke's opinion that an inquisition of *felo de se* taken before the coroner upon sight of the body is not traversable, but is conclusive upon the executors and administrators of the deceased (3 Inst. 55). Lord Hale however was of a different opinion (1 Hale, Pleas of the Crown, 416); and the following cases adopted the latter view, and admit administrators or executors of a *felo de se* to remove the inquisition by *certiorari* and traverse it, in order to which it would seem that administration or probate, as the case may be, must have been granted. *R.* v. *Parker*, 2 Lev. 140; *R.* v. *Aldenham*, ib. 152, and *R.* v. *Ripley*, Skinner, 45; and in *Sir William Darcy's Case*, 1 Freeman, R. in Ch. 28, it appears that the courts of equity would recognize an administrator of a *felo de se*.

SIR C. CRESSWELL: In my opinion the executor is entitled to probate.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

1860.
November 7.
And
1861.
April 24.

SOPWITH
v.
SOPWITH.

(*Before the* JUDGE ORDINARY.)

SOPWITH *v.* SOPWITH.

Petition for Restitution of Conjugal Rights.—Answer alleging Petitioner's Adultery.—Reply of Estoppel.—Demurrer.

B. petitioned for restitution of conjugal rights, C. in answer alleged (*inter alia*) B.'s adultery between certain dates. B. replied, by way of estoppel, that the same charges of adultery had been put in issue in a suit for judicial separation brought by C. against him, in which she had failed to prove the adultery. On demurrer to this reply of estoppel, the Court overruled the demurrer, and held that C. was not entitled, in answer to the petition for restitution, to allege the same facts of adultery which she had failed to prove in the previous suit; but

SEMBLE, if the identical issue were triable by different evidence in the one case, and in the other, the doctrine of estoppel would not apply.

This was a question arising on the pleadings in a suit for restitution of conjugal rights, brought by Henry Lindsell Sopwith against Matilda Sopwith. The petition, dated the 3rd of February, 1860, alleged the marriage of the parties on June the 25th, 1857, cohabitation till the 18th of May, 1858, and that since that date the wife had withdrawn herself, etc., and concluded with the usual prayer.

The answer of the wife, dated February the 29th, 1860, admitted her withdrawal in fact, but justified such withdrawal by alleging *that* her husband had, on divers occasions since the 25th of June, 1857, committed adultery with one M. A. Prickett; *that* on divers occasions between August the 1st, 1857, and December the 20th, 1857, he met the said M. A. Prickett in London, and committed adultery with her; *that* during the years 1858 and 1859 the said M. A. Prickett habitually visited the said H. L. Sopwith at his residence at Tunbridge Wells, and that on divers occasions they committed adultery; *that* between April the 1st, 1858, and March the 1st, 1859, the said H. L. Sopwith frequently visited the said M. A. Prickett at her residence at Tunbridge Wells, and on divers occasions committed adultery; *that* in or about the month of April, 1858, the said H. L. Sopwith and the said M. A. Prickett committed adultery in a certain building at Tunbridge Wells aforesaid; *that* in or about the month of April, 1858, the said H. L. Sopwith committed adultery with the said M. A. Prickett in a certain place called Jack Wood Quarry, at Tunbridge Wells, aforesaid; *that* in or about the month of June, 1858, the said H. L. Sopwith committed adultery with the said M. A. Prickett in the said Jack Wood Quarry.

Wherefore the respondent prayed a judicial separation, by reason of such adultery.

In a further answer dated July the 2nd, 1860, the respondent alleged *that* on divers occasions between June the 29th, 1857, and June the 29th, 1859, the said H. L. Sopwith committed adultery with M. A. Prickett, *and particularly*[1] as hereinafter set forth; *that* between January the 1st, 1858, and June the 29th, 1859, the said M. A. Prickett habitually visited the said H. L. Sopwith at his residence, Tunbridge Wells, and that the said H. L. Sopwith on divers of such occasions committed adultery with the said M. A. Prickett,

[1] Words in italics struck out by order on July 11, 1860.

1860. November 7. And 1861. April 24.

SOPWITH v. SOPWITH.

and that from July the 1st, 1859, to December the 31st, 1859. the said M. A. Prickett resided in the house of the said H. L. Sopwith aforesaid, and habitually committed adultery.

The petitioner, in his reply, denied *that* from the 1st of July, 1859, to the 31st December, 1859, he, at his residence at Tunbridge Wells, habitually committed adultery, etc.; and alleged, secondly, *that* the respondent ought not to be admitted to allege in her answer adultery committed by the petitioner with the said M. A. Prickett previously to the 29th of June, 1859, for that on the 29th of June, 1859, the respondent filed a petition in this Court against the petitioner, in a cause of judicial separation, on the ground that he had committed adultery with the said M. A. Prickett; that the petitioner, in his answer to the said petition, denied the adultery therein alleged, and that issue having been joined thereon, the said cause was tried before the Judge Ordinary, without a jury, who by his judgment, delivered on the 24th of December, 1859, pronounced that the said alleged adultery had not been proved, and dismissed the petition. Thirdly, similar replications as to the other charges of adultery pleaded in the answer up to the 29th of June, 1859.

On the 2nd of November the petitioner's solicitors were served with a notice that the respondent would move the Court by counsel to direct the second and third paragraphs of the replication to be struck out, as bad in law and irrelevant to the issue in the cause.

On this motion being called on the 7th of November, the Judge Ordinary directed the question to be raised by demurrer, that the whole matter might appear on the record in case of its going before the Court of Appeal.

The case accordingly came on for argument on demurrer.

Dr. Phillimore, Q.C., and *Dr. Spinks*, in support of the demurrer, contended that the common-law doctrine of estoppel was not applicable to this suit, being a suit other than

for dissolution of marriage, and therefore to be governed by the principles on which the Ecclesiastical Court used to act in such matters. Though the evidence may fall short of adultery, yet it may establish such misconduct as would induce the Court to withhold its decree for restitution of conjugal rights. They cited *Best* v. *Best*, 1 Add. 411; *Moore* v. *Moore*, 3 Moo. P. C.; *Forster* v. *Forster*, 1 Const. 153; *Bramwell* v. *Bramwell*, 3 Hagg. 618; *Dysart* v. *Dysart*, 2 N. C. 16.

Dr. Wambey, in support of the estoppel: A judgment of a court of competent jurisdiction on a matter directly in issue, is conclusive between the same parties upon the same matter, and the principle is as applicable in this Court as in any other (*Duchess of Kingston*, 3 Smith's L. C. 424; Buller's Nisi Prius (2nd edit.) 233; *Outram* v. *Morewood*, 3 East, 346; *Marriott* v. *Hampton*, 7 T. R. 269; *Barrs* v. *Jackson*, 1 Phil. 582). The argument on the other side is founded on certain *dicta* to the effect that less is required to bar a suit than to maintain one; these are at best doubtful (*Barlee* v. *Barlee*, 1 Add. 301). *Cur. adv. vult.*

April 24.

THE JUDGE ORDINARY gave judgment: This suit was instituted by the petitioner for restitution of conjugal rights. The respondent by her answer charged the petitioner with having committed adultery with one Mary Ann Prickett, at various places and on various occasions. The petitioner, in reply, traversed some of the matters alleged, and as to others stated in substance that the respondent ought not to be admitted to allege such matters, because she had in 1859 filed her petition for a judicial separation from the present petitioner, on account of adultery alleged to have been committed by him with Mary Ann Prickett on the same occasions as mentioned in her present answer; that issues were joined on those identical allegations, which were tried before the Judge Ordinary without a jury, who decided that the then re-

1860. November 7. And 1861. April 24. SOPWITH v. SOPWITH.

spondent had not committed adultery as alleged, and dismissed the petition. This replication was demurred to, and the petitioner joined in demurrer. On the argument of the case before me it was not denied that the transactions alleged in the original petition by the wife, and those in her answer to the present petition to which the estoppel is pleaded, were identical; and it was admitted that if the doctrine of estoppel is applicable under such circumstances, the answer could not be sustained. But it was contended that, according to the principles on which the Ecclesiastical Courts proceeded, and which are to be observed by this Court in all suits and proceedings other than proceedings to dissolve any marriage, the doctrine of estoppel is inapplicable in this case. It was said (and there are *dicta* of learned judges to justify the assertion), that the same strictness of proof has not been required to establish a matter pleaded by way of defence as when the same matter is alleged in the petition, and therefore it does not follow that the respondent may not be able to establish her defence charging the petitioner with adultery, although she failed to give such evidence of it as would suffice to support her petition for judicial separation; and if that be so, it cannot in strictness be said that the question now to be dealt with has been already decided. It is certainly a startling proposition, that if an issue be joined as to the same identical fact, a different amount of evidence is necessary to sustain the issue according as the averment of that fact is made by the plaintiff or defendant. I am not aware that any such difference has ever been recognized in a common-law court. No case or even *dictum* to that effect was cited at the bar, but reliance was placed upon the language of some of the most distinguished persons who ever presided in the ecclesiastical courts of this country. Still no case precisely in point was cited. If I had found any such I should have considered myself bound by it; although I cannot but think that great inconvenience would result from such a doctrine. Suppose an issue joined on the allegation of

adultery made by the respondent and tried before a jury. What amount of proof is to be required? Surely that which convinces them that the act alleged was done; and the same must be the rule when the fact is alleged by the petitioner. Can it be said that the judge is to tell the jury in the latter case that, if they are not convinced, they must negative the fact alleged, but that in the former, unless they are satisfied of innocence, they should find guilt? I do not believe that any of the *dicta* to be found in the reports of the Ecclesiastical Courts will warrant such a conclusion. One of the earliest and most remarkable proceeded from Sir W. Scott, in *Forster* v. *Forster*, 1 Cons. Rep. 144. That was a case of divorce brought by the husband against the wife, by reason of adultery. The wife recriminated, and pleaded in bar a similar charge against the husband. In his judgment Sir W. Scott says: "The defence sets up, secondly, a species of justification "arising from similar misconduct of the husband, which cer- "tainly is not inconsistent with the plea of denial, for it is "fairly open to the party to say in the same breath, 'I have "'not committed adultery; but if I have, you have barred "'yourself of the remedy you pray, by your own misconduct "'of the same species; for though adultery cannot be justified "'in itself, it may be legally justified against you by the proof "'that you have produced the evil of which you pretend to "'complain.'" The learned Judge then commented on the evidence brought to prove the charge made by the wife, and proceeded:—"In these cases I am to understand that he failed "in his endeavours, but failed from no want of purpose or "activity on his own part, but from an honest and powerful "resistance on the other. These instances, therefore, furnish "a strong corroboration to the conclusion to be drawn from "the other case, where it is evident that no such resistance "was to be apprehended, and where the conquest by such ar- "guments and solicitations and bribes, and his bodily force, "all which were used, must be presumed to be easy. But

1860. November 7. And 1861. April 24.

SOPWITH v. SOPWITH.

"even if no such definitive presumption attached, I should be "inclined to hold that the general conduct of the husband, as "shown, is quite sufficient to support a plea in bar, though "not sufficient to support an original accusation of adul- "tery. For it is a principle which runs through a variety "of cases, that many things are good for the one purpose "though deficient for the other. *The husband who enters "the court with a criminal imputation on the conduct of his "wife must purge his own conduct of all reasonable imputation "of the same nature;* and, if he complained of her impurities, "must be untainted by any gross impurities of his own. It "is a satisfaction to find this doctrine in the case alluded to, "of *Lord Leicester and Lady Leicester*, laid down by the able "person who then presided in the Court of Arches. In an "accurate note of his judgment I find it expressly laid down, "'that where adultery was pleaded by way of recrimination "'only, to bar, it was not necessary to prove such strong facts "'against the plaintiff as would be sufficient to convict the "'other party in a suit for divorce; for, to obtain a sentence "'of divorce, *the husband must have a pure character.*'" I have found it very difficult to form a positive opinion as to the meaning of this passage. It may mean, that a husband complaining of his wife's adultery, if his own conduct is impeached, has the *onus probandi* cast upon him at least to this extent, that if a case of suspicion is made out, he must clear himself; or it may mean that a wife does enough to bar the husband's claim to relief by showing that he has been guilty of impure and indecent conduct, although not of the act of adultery. If the latter is the true meaning, it would seem to follow that a plea imputing misconduct to that extent, and not alleging adultery, would be a good plea. If in the present case Mrs. Sopwith had been advised that misconduct short of adultery would suffice to bar her husband's petition, no doubt her plea would have been in that form. But whatever be the real meaning of the passage cited from the judgment

delivered in *Forster* v. *Forster*, the decision is not an authority in the present case, for there Sir William Scott clearly was of opinion that the evidence established the adultery of the husband; and the passage cited is inapplicable to the present case on another ground, for here the husband is not "entering the Court with a criminal imputation on the con-"duct of his wife, and is not called upon to purge his own "conduct of all reasonable imputation of the same nature." There are also several cases in which it has been said by learned judges that offences that have been condoned are revived by proof of a less stringent nature than would be required to establish an original charge. Thus it has been said that adultery condoned may be revived by solicitation of chastity; and either condoned adultery or cruelty may be revived by acts of unkindness and harshness, which would not sustain a petition for judicial separation on the ground of cruelty (*Durant* v. *Durant*, 1 Hagg. 733; *D'Aguilar* v. *D'Aguilar*, ib. 773; *Bramwell* v. *Bramwell*, 3 Hagg. 618). But it is remarkable that in none of these cases was the point actually decided. The principle upon which the question of revival of condoned offences depends is inapplicable to the present case. All condonations are held to be conditional, and misconduct short of that which would sustain a suit may be a breach of the implied condition. Thus solicitation of chastity, acts of harshness, although not amounting to legal cruelty, may be sufficient to constitute a breach of the condition; and if that be so, it would seem that a plea alleging such acts, and not showing either adultery or legal cruelty, would be a good answer to a plea of condonation. *Molony* v. *Molony*, 2 Add. 249, was a cause of restitution of conjugal rights, and involved a principle resembling that which I have suggested. The admission of the wife's responsive allegation was opposed, on the ground that the facts pleaded in bar were not such as would entitle the wife to a sentence of separation, and were therefore insufficient, such sentence being prayed. The learned judge

1860. November 7. And 1861. April 24.

SOPWITH v. SOPWITH.

admitted the allegation without pledging himself as to the effect of the facts pleaded as a bar, either wholly or in part, to the sentence prayed on behalf of the husband, at the final hearing of the cause. That decision seems to proceed on the ground that matters of a less aggravated character than are necessary to sustain a suit may be sufficient to bar it; and that it is sufficient to allege in pleading such matters according to the truth. In none of these cases do I find it decided, that where a distinct fact is put in issue, a greater or less amount of evidence is required to establish it according as the fact is averred in a libel or responsive allegation; and, unless that can be established as a principle upon which the Ecclesiastical Court proceeded, the whole foundation for the argument in this case on behalf of the respondent fails. The case of *Moore* v. *Moore*, 3 Moore, P. C. 84, which was much relied on by the counsel for the respondent, does not seem in principle to go beyond *Molony* v. *Molony*. James Moore had instituted proceedings against his wife Jane Moore, in a cause of divorce by reason of adultery. His libel was rejected. The wife afterwards sued for restitution of conjugal rights. The husband brought in a responsive allegation, pleading the same acts and in the same form as in the libel that had been rejected. The Judge of the Court of Arches refused to admit the allegation, on the ground of its being in substance the same as the libel originally given in and rejected by that court. On appeal to the Judicial Committee the responsive allegation was admitted, and Dr. Lushington, in pronouncing the opinion of the Committee, said: "Unless the "husband had condoned or been a party to the concealment "of acts of adultery, it is undoubtedly competent for him to "allege them as grounds for a decree in a suit for restitution "of conjugal rights, even though they should not be suffi- "ciently specific to support an allegation in a suit for divorce." But this decides nothing with regard to the point now before the Court; it turned on a question of pleading, and whether

1860.
November 7.
And
1861.
April 24.

SOPWITH
v.
SOPWITH.

the allegations were sufficiently specific, not on the amount of evidence necessary to prove them. Inasmuch, then, as I do not find any decision in the Ecclesiastical Courts, that a matter once brought directly in issue and decided, can be again controverted between the same parties so as to be again triable, I think that the principle upon which the common-law doctrine of estoppel rests, and which extends to decrees in equity, is applicable to suits in this Court; and that in this case it is not competent to the wife to bring against her husband the same identical charge of adultery which was put in issue, tried, and disposed of by the judgment in the former suit, and consequently that she cannot be admitted to plead that charge in answer to the present petition. The principle however upon which my judgment proceeds, may not be applicable in all cases, in consequence of the different rules of evidence that prevail in different suits; *e. g.* in a suit instituted by the husband for divorce on account of adultery, the wife may plead cruelty, desertion, or such wilful misconduct as has conduced to the adultery, so as to bring her case within the latter part of the 31st section of the 20 & 21 Vict. c. 85; but she cannot be heard as a witness in support of such an allegation. In an independent suit by her for judicial separation on the ground of cruelty or desertion, or for dissolution of marriage on the ground of adultery coupled with cruelty or desertion, she may give evidence in support of her case; and inasmuch as the same identical issue in these two cases would be triable on different principles as to the admissibility of evidence, the doctrine of estoppel could not justly be applied. In the present case, my judgment on the demurrer is for the petitioner.

1860.
Nov. 9 to 27, exclusive of Sundays and Wednesdays.

SHEDDEN v. PATRICK.

Legitimacy Declaration Act, 1858.

(*Before the Full Court*,—THE JUDGE ORDINARY, WIGHTMAN, *and* WILLIAMS, J.J.)

WILLIAM PATRICK RALSTON SHEDDEN AND ANABELLA JEAN SHEDDEN, petitioners, *v.* HER MAJESTY'S ATTORNEY-GENERAL, respondent, AND ROBERT SHEDDEN PATRICK AND WILLIAM PATRICK (cited to see proceedings, intervening).[1]

Petition for Declaration of Legitimacy and Status of British-born Subject.—21 & 22 *Vict. c.* 93.—*Parties to such a Petition.*—*Plea of* res judicata.—*Declarations in Questions of Legitimacy.*—*Berkeley Peerage Case.*

To a petition under the Legitimacy Declaration Act the Attorney-General is the necessary respondent; the petitioners have a right to have their case heard as between themselves and him; and the parties cited *pro interesse suo*, cannot sustain a plea of *res judicata*, as between themselves and the petitioners, in bar of the whole proceedings.

SEMBLE, by the 10th section of the Act, the Legislature intended to guard against the danger of disturbing former judgments, not to hinder a petition under the Act from being heard.

Declarations of members of the family in questions of legitimacy are not admissible *post litem motam*, whether the *lis* be known or not known to the person making the declarations.

To constitute *lis mota*, for this purpose, there must be more than the existence of the state of facts on which the claim is founded, or even of litigation on kindred matters; there must have been controversy in respect of the very point in dispute as to which the evidence is tendered.

Alderson, B.'s description of *lis mota*, in *Walker* v. *Beauchamp*, 6 C. & P. 552, has been overruled.

This was a proceeding under the Legitimacy Declaration Act, 21 & 22 Vict. c. 93.

The petition stated:—

1. That the petitioners were both natural-born subjects of

[1] This report does not pretend to give even an abstract of the evi-

her Majesty; that William Patrick Ralston Shedden is the son and heir, and Anabella Jean Shedden a grandchild of William Shedden, late of Roughwood, county of Ayr, in North Britain, but at New York in America deceased, whilst living also a natural-born British subject, and that the petitioners are both domiciled in England.

2. That William Shedden, the father of the elder petitioner, was the son of John Shedden of Roughwood, and his wife Jean Shedden, formerly Ralston; that John Shedden was the owner in fee of the estate called Roughwood, and other freehold estates in Ayrshire; that he died in 1770, aged eighty, leaving the said William Shedden his only son, and two daughters—Marion, married to John Patrick, of Trearne, and Anabella, who died unmarried.

3. That William Shedden, who was born and resided in Scotland, left that country *animo revertendi*, and went to Virginia about the year 1770, for temporary trading purposes; that in consequence of the political disturbances which ensued in the North-American provinces from 1774 till 1783 his return home was delayed; that in 1783 he went to New York to establish certain claims to compensation under the treaty of peace as a British subject, who by reason of his loyalty to the British Crown had suffered losses, and also to wind up his Virginia affairs; that he always intended to leave New York and return to Scotland for life as soon as his com-

dence and arguments which occupied the Court for fourteen days. Certain points of law arose and were decided in the course of the argument; these it is hoped are correctly stated. In the result, the whole case, though of the deepest interest to the parties concerned, was merely a question of fact, depending very much on the genuineness of a certain letter. As the, at present, last act of a course of litigation, which commenced in 1801 and has twice, at a long interval of time, occupied the attention of the Scots Courts and the House of Lords, the judgment of the Court is given at length. The substance of the petition and answer, and the above-mentioned letter, printed herewith, will, it is believed, be all that is necessary to make the judgment quite intelligible.

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

pensation claims should be settled, but that, in fact, such claims were not settled till 1802.

4. That the said William Shedden died at New York, on 13th of November, 1798, aged fifty-one, being then a British subject, and seised of real estates in Scotland, which had descended to him from his father, and of other real estates which he had acquired.

5. That the said William Shedden, at the end of the year 1785, intermarried with Rachel Kennedy, who soon after died, and by whom he had an only child, a daughter, born in 1786.

6. That the said William Shedden whilst residing in the State of New York was, in the year 1790, being then a widower, lawfully married to Ann Wilson, spinster; that from and after their said marriage the said William Shedden and the said Ann Wilson, then Shedden, lived and cohabited together as lawful husband and wife, until the death of the said William Shedden; that during such time they owned and acknowledged each other to be husband and wife, and as such were accounted, etc., amongst their neighbours, friends, acquaintance, and others, and that such marriage was an open and notorious fact.

7. That there was issue of such marriage one daughter, Jean Ralston Shedden, born in the year 1792, and one son, William Patrick Ralston Shedden, the petitioner, born in 1794.

8. That the said William Patrick Ralston Shedden, the petitioner, in the year 1855 brought an action for the recovery of some land at Whitehall, in the State of New York, of which his father was seised at the time of his death, which action was tried in the State of New York in February, 1855, and that by the verdict and judgment thereon obtained in that action the validity of the said marriage, and consequent legitimacy of the petitioner, were established in the State of New York, where it was contracted.

9. That William Patrick Ralston Shedden, the petitioner,

would have succeeded long since in establishing in Great Britain the validity of the said marriage, but for the state of ignorance in which he was purposely kept as to the said marriage and other family matters by various members of his family who were interested in denying his legitimacy, some of whom had the sole care and charge of him during his youth, and that he had specially been prevented, etc., by the conduct of Robert Patrick, John Patrick, William Patrick, hereinafter mentioned, and one Hugh Crawfurd, since deceased.

10. That in case of the intestacy of the said William Shedden and the illegitimacy of his children, his next of kin at the time of his death, and the persons entitled in distribution to his personal estate, would have been his nephews and nieces, Robert Patrick, John Patrick, and William Patrick, and Jean and Elizabeth Patrick, spinsters, but that their claims to any share of his personal estate in distribution were and are barred by his will and codicils, proved by his executors in America at the time, and afterwards proved by the said William Patrick Ralston Shedden in this country.

11. That in case of the illegitimacy of the children of the said William Shedden, his heir-at-law would have been his nephew Robert Patrick, the eldest son of his aforesaid sister Marion, wife of John Patrick, of Trearne; that the said Robert Patrick died about the year 1838, leaving John Shedden Patrick his eldest son and heir-at-law; that the said John Shedden Patrick died about 1844, and that Robert Shedden Patrick, of Trearne and Hasselhead, is his eldest son and present heir-at-law.

12. That the said William Patrick, a writer to the Signet in Edinburgh, and who was the guardian of William Patrick Ralston Shedden, the petitioner, is at present in possession of the aforesaid freehold estates in Ayrshire, or some part thereof, of which the said William Shedden died seised.

13. That the said William Patrick is the only surviving

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

child of the aforesaid John Patrick, and there is no child now living of any brother or sister of the said William Patrick, and in case of the illegitimacy of William Shedden's children, the said William Patrick would now be his sole next of kin.

14. Stated the issue of Anabella Burr, the eldest daughter of William Shedden.

Your petitioners therefore humbly pray that your Lordships will be pleased to entertain this their application, and allow them to prosecute the necessary proceedings thereupon, and will be pleased to hear and determine the same, and to pronounce (on sufficient evidence being adduced by them or on their behalf) that the said William Shedden and Ann Wilson were lawfully married prior to the birth of the first-named petitioner and his sister Jean Ralston Shedden, and that your said first-named petitioner William Patrick Ralston Shedden is their legitimate son and heir, and a natural-born subject of her Majesty, and that all proper parties may be cited.

To this petition the respondent, her Majesty's Attorney-General, answered:—First, that he left the said petitioners to make such proof thereof as they shall be enabled; and secondly, claimed on behalf of the Crown all such right and interest as he on behalf of the Crown should appear to have in the premises, and in any matter arising out of the proceedings upon this said petition, and submitted the same to the judgment, order, and direction of this honourable Court.

Robert Shedden Patrick and William Patrick, the parties cited, in substance answered that:—

1. The questions raised by the said petition (the material allegations of which we deny) have already been adjudged and finally determined against the first-named petitioner, in suits instituted by him in the Court of Session in Scotland, which judgments have been affirmed by the House of Lords, and will appear from the statement hereinafter contained; and we say that neither of the petitioners possesses the condition re-

quired by the 1st section of the Legitimacy Declaration Act, 1858, to entitle him or her to petition this honourable Court, or to claim the benefit of that Act.

1 *a*. The matters raised by the petition were concluded by and in the judgments hereinafter mentioned.

2. That William Shedden was, at the time of his death, owner in fee-simple of landed property in Ayrshire, and died without lawful issue, and intestate as to his estate in Scotland, leaving his nephew Robert Patrick his heir-at-law, who thereupon became entitled to the said lands (subject to the debts of the said William Shedden, which he, Robert Patrick, paid to a large amount), and was served thereto as heir, and entered into possession thereof; by such service his title to the estate, according to the law of Scotland, was asserted and perfected; but was liable to be challenged within a certain period by an action of reduction.

3. That on the 18th of December, 1801, the said William Patrick Ralston Shedden, then an infant, by Hugh Crawfurd, his factor *luco tutoris*, instituted in the Court of Session in Scotland (having jurisdiction) an action of reduction against the said Robert Patrick, seeking to have the said service set aside, on the ground that he, William Patrick Ralston Shedden, and not the said Robert Patrick, was the rightful heir-at-law of the said William Shedden, and entitled to the lands of Roughwood; that Robert Patrick duly appeared to and defended the said action, in which the following issues between the parties arose, whether the said William Patrick Ralston Shedden was the legitimate son of the said William Shedden, and a natural-born subject of the realm, and heir-at-law of the said William Shedden; that by decree of the said Court of the 1st of July, 1803, it was determined that the said William Patrick Ralston Shedden was not the legitimate son of the said William Shedden, nor his heir-at-law, nor a natural-born subject of this realm, and that the said service should not be set aside.

1860.
Nov. 9 to 27.

SHEDDEN
v.
PATRICK.

4. That the said decree was conclusive, unless reversed by the House of Lords, to whom an appeal lay.

5. That a petition of appeal to the House of Lords, in which the same material questions were directly in issue, was presented; that the House of Lords of the 3rd of March, 1808, affirmed the decree of the Court of Session; that by the said judgment the *status* of the said Robert Patrick, as heir-at-law of the said William Shedden, and the illegitimacy of the petitioner William Patrick Ralston Shedden, became and were, as between the parties to the said cause, matters finally adjudged and determined.

6. A *bonâ fide* sale of the lands of Roughwood, with warranty, etc., by Robert Patrick to William Patrick, who is now in possession.

7. That in February, 1848, the said William Patrick Ralston Shedden instituted in the Court of Session in Scotland (having competent jurisdiction) an action of declarator, reduction, and count and reckoning, against William Patrick and Robert Shedden Patrick, and the guardian of the latter (since deceased), seeking, among other things, to have the said service and the said decrees of the Court of Session and House of Lords and the said sale set aside, on the ground, as alleged, that the said service and decree had been obtained by fraud of William Patrick, Robert Patrick, and Hugh Crawfurd, then deceased; that on the 25th of April, 1849, pending the said last-mentioned action, the said William Patrick Ralston Shedden instituted, in the said Court of Session, a supplementary action of declarator, reduction, and count and reckoning, against the same parties, seeking to have it declared that he, as the only and lawful son of the said William Shedden, was his lawful heir, and praying the same relief as before, which actions were conjoined; that by a decree of the Court of Session on the 10th of March, 1852, it was adjudged that the said service and judgments and decrees had not been obtained by fraud, and that the said William Shedden was

not married to the said Ann Wilson prior to the birth of the said William Patrick Ralston Shedden, etc.[1]

8. That the said William Patrick Ralston Shedden presented an appeal from the last-mentioned judgment to the House of Lords, who on the 15th of May, 1854, affirmed in all respects the decree of the Court of Session in the said conjoined actions, and also adjudged that the said William Patrick Ralston Shedden was not a natural-born subject, but an alien, which question was in issue between the parties.

9. That at the time of bringing the original action of declarator, reduction, etc., in the seventh paragraph mentioned, another action was brought in the Court of Session, as a consistorial court having jurisdiction, by the said William Patrick Ralston Shedden, against the same parties, called an action of declaration of legitimacy, which was suspended till the termination of the said conjoined actions, when judgment was given by default against the said William Patrick Ralston Shedden.

10. That the suits, actions, and appeals in the 3rd, 5th, 7th, and 8th paragraphs above mentioned were brought by the said William Patrick Ralston Shedden for the same objects and in respect of the same matters and things as those for and in respect of which the said William Patrick Ralston Shedden and the other petitioner now petition this Court, etc., and that the said final judgment and decrees in the said suits, actions, and appeals are finally conclusive and binding as to those questions, and are a bar to the present petition.

11. That the petitioners ought not to have the relief and decree for which they pray, because such relief and decree would be a proceeding which would necessarily and unavoidably affect and be repugnant to, and inconsistent with the

[1] In the report of *Shedden* v. *Patrick et al.*, 1 M'Queen's Appeal Cases from Scotland to House of Lords, p. 579, it is stated that "on the 17th of January, 1851, the appellant obtained permission to amend his libel by the putting on record the following allegations (viz. of marriage prior to the birth of children), which gave the case a new complexion."

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

said final judgments and decrees referred to, and would necessarily confer on the said William Patrick Ralston Shedden the *status* or condition of heir-at-law to the said William Shedden, which has already, by the said judgments, been pronounced to have belonged to the said Robert Patrick, and successively to the said Robert Shedden Patrick, and would necessarily declare that the said William Shedden and Ann Wilson were lawfully married prior to the birth of the said William Patrick Ralston Shedden, and that the said William Patrick Ralston Shedden is their legitimate son and heir, and a natural-born subject of the realm, contrary to the said final judgments and decrees whereby, etc., and that the relief and decree prayed by the said petitioners is precluded by the 10th section of the Legitimacy Declaration Act, 1858, whereby it is enacted "that no pro-"ceeding to be had under the said Act shall affect any final "judgment or decree already pronounced or made by any court "of competent jurisdiction."

12. Denies that the said William Patrick Ralston Shedden is a natural-born subject of the realm, or son and heir-at-law of the said William Shedden, or that the other petitioner has any interest in the matter save through the said William Patrick Ralston Shedden.

13. Denies William Shedden to have been the lawful father of William Patrick Ralston Shedden.

14. Denies William Shedden at the time of his death to have been a British subject.

15. Denies the marriage of William Shedden and Rachel Kennedy.

16. Denies the marriage of William Shedden, widower, to Ann Wilson, in 1790, or that from that time they cohabited as lawful husband and wife, and were so reputed, etc.

17. Denies any lawful issue of William Shedden and Ann Wilson.

18. Denies any knowledge of, or privity to the action of ejectment in New York in 1855.

19. Denies that William Patrick Ralston Shedden was left in a state of ignorance as to the alleged marriage of William Shedden, and of other family matters, by any member of his family, or was hindered from establishing in Great Britain the said alleged marriage by the conduct of Robert Patrick, John Patrick, William Patrick, or Hugh Crawfurd.

Prayed to reject the prayer of the petition, and to be dismissed with costs.

This petition now came on for hearing.

Mr. K. Macaulay, Q.C., *Sir Hugh Cairns*, Q.C., *Dr. Phillimore*, Q.C., *Mr. A. J. Stephens*, Q.C., and *Mr. W. C. Beasley* for the petitioners.

The Honourable R. Bourke for the Attorney-General.

Mr. Rolt, Q.C., *Mr. Bovill*, Q.C., *Dr. Deane*, Q.C., and *Mr. John J. Powell* for the respondents.

The petitioners' counsel prayed the Court to postpone the hearing of the case on the ground that their briefs, containing an immense mass of documentary and written evidence, had been delivered at so late a period that it was impossible to do justice either to their clients or themselves without further time to make themselves masters of the case.

Mr. Rolt, Q.C., *contrà*.

And the Court refused to postpone the case; whereupon the counsel for the petitioner left the Court, and Miss Anabella Jean Shedden, the younger petitioner, commenced the statement of the petitioner's case.

A question of law being raised by Mr. Patrick having put in a plea of *res judicata* in bar to any proceedings taking place, the Court directed this question to be argued by one

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

November 10.

counsel on each side before going further into the facts of the case.

Mr. Rolt, Q.C., in support of the objection: First, independently of the 10th section of the Act, the general principle of *res judicata* is applicable to the present case, for the questions and matters raised and put in issue by the present pleadings are the same on which the final judgment and decree of the House of Lords passed (*Shedden* v. *Patrick and others*, 1 M'Queen's House of Lords Cas. on appeal from Scotland, 535). The learned counsel referred to Lord Cranworth's opinion in that case at p. 607, and cited *Outram* v. *Morewood*, 3 East, 345; *Eastman* v. *Laws*, 5 Bing. N. C. 444, and *Barrs* v. *Jackson*, 1 Phill. 582.

THE JUDGE ORDINARY: Lord Cranworth's remarks are not, I think, strictly applicable to the point before us. In that case there was no question of new proceedings to be barred by a plea of *res judicata*; but whether sufficient fraud was alleged relevant to upset a previous judgment of the House of Lords.

WILLIAMS, J.: It is of the very nature and essence of all estoppel that it should be reciprocal. Could it be said, if the judgment of the House of Lords had been the other way, that your parties or the Attorney-General would have been estopped under this Act? It appears that under the statute Miss Shedden and her father have a perfect right to have the case heard as between themselves and the Attorney-General.

Mr. Rolt contended, secondly, that whatever opinion the Court might come to on the applicability of the general principle, the 10th section of the Act would hinder the Court entertaining this suit, as a judgment affirming the petitioner's legitimacy would be in direct conflict with, and must necessarily affect, the previous decisions.

The *Attorney-General*, Sir R. Bethell (*the Hon. R. Bourke* with him), stated that in his view, if it were not for the 10th section of the Act, the ordinary objection of *res judicata* would be no bar to the petitioner; the question seems to be whether these proceedings will necessarily affect a judgment. If but for the 10th section they would, then comes the further question whether this would prevent this Court entertaining the petition, or whether the section would prevent any proceedings being taken elsewhere, with a view to affect previous judgments.

THE COURT, without calling on *Dr. Phillimore*, who was ready to argue the point for the petitioners, said:—We are all of opinion that the case must proceed; it depends entirely on this Act of Parliament, before which no such proceeding was known in this country. In construing an Act of Parliament it is difficult to apply technical rules of courts of law; we must determine as well as we can the meaning of the words used by the Legislature. The Act has given certain persons a right to call on the Court for a decision in respect of the matter specified in the 1st and 2nd sections, and by the 6th section the Attorney-General is the necessary respondent; by the 7th section other persons are allowed to come in *pro interesse suo* and supply any deficiencies, but they cannot say *res judicata*. Then as to the 10th section, which says, "no proceedings to "be had under this Act shall affect any final judgment or de- "cree already pronounced or made by any Court of competent "jurisdiction;" what the object of the Legislature was, we can only judge from the language it has used, and we suppose they thought some decrees might have the effect of disturbing former judgments, and so have endeavoured to guard against such damage as they thought might accrue; but the words are not "no proceedings shall be taken," but "no proceedings shall affect."

The case then proceeded, Miss Shedden for several days

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

conducting the petitioners' case; *Dr. Phillimore* for some time, and subsequently *Mr. J. B. Phear*, watching the case for the petitioners, in respect of points of evidence and questions of law arising out of the conduct of the case. During the last three or four days the petitioners' case was entrusted wholly to *Mr. Collier*, Q.C., and *Mr. Couch*.

The case as summed up by the counsel on either side, and, as decided by the Court, was purely a question of fact, turning principally on documentary evidence, and the conduct of the parties in reference to the previous suits. The question of what constitutes *lis mota*, so as to render declarations by members of the family inadmissible in cases of pedigree, was however discussed, and the following letter from John Patrick, of New York, to W. Shedden, W.S., gave occasion, with some others of later date, to some judicial decision on the point:—

"New York, November 9th, 1798.

"Dear William,—I wrote you some time ago, *vid* London, "informing you of the melancholy state of this city, and our "situation as refugees. I have pleasure in adding that the "fever has at last totally disappeared. We have all been for- "tunate in escaping it. I was absent only three weeks; Mr. "Todd seven, and Bob Patrick nine. The consequences of "this pestilence have been the death of about 3,000 persons, "many of them citizens of the utmost respectability.

"It is with the most extreme sorrow I have now to inform "you that our friend Mr. William Shedden's disorder has at "last arrived at a crisis. He is at this moment in the most "advanced stage of an unconquerable consumption, and all "the weakness of mortality before his eyes. Every revolving "hour threatens a dissolution to his existence. His fate is "fixed; he must die; he cannot live. But this is not all; "he has, from considerations which he conceived moral,

"natural, legal, and proper, at the moment when eternity "was staring him in the face, united himself in matrimony "to the woman who has for many years lived with him in a "very different situation.

"His object in this proceeding was to rescue from a state "of bastardy and introduce into the world with all the privi- "leges appertaining to those who are born under the influ- "ence of the law, two infant children; one a girl of about "six years old, the other a boy of about five. The ceremony "took place only on the 7th instant; it was to him a hard "struggle, but the considerations above-mentioned prepon- "derated. I of course was not consulted, but he communi- "cated the whole to me after it had taken place, with his "motives. It was out of my power to interfere or prevent "it, nor was it my wish. I have always had a pride in act- "ing in things of that sort with a spirit of independence and "propriety, nor did I ever interfere. In addition to that in- "strument, he has likewise executed his last will and testa- "ment, the substance of which I am unable to communicate "at present, but you may of course guess nearly the con- "tents.

"On his deathbed (which it will doubtless prove) he com- "municated to me things that have been hid from the world; "facts that would excite surprise. He likewise requested me "to accept of the office of executor, in conjunction with two "others who are but little connected, to which I consented, "being unwilling to refuse this last request; although it will "undoubtedly entail on me a world of toil, trouble, and "difficulty, and besides place me in a situation that may "prove unpleasant and delicate: but the thing is done. Be- "sides the two children mentioned, he has one other, a girl "about twelve years old, by another woman who is long dead, "his very image, but who can reap no benefit from the mea- "sures adopted, being considered in the eye of the law a "bastard.

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

"The other two children, though charming infants, have "not the same resemblance to him.

"* I have further to add in the most perfect confidence, that "in my opinion the state of things will be such as to render "a disposal of his property necessary in order to liquidate the "claims that I apprehend will come against it. Indeed, I "have every reason to fear, and I speak from facts within my "own knowledge, that his affairs are in a very desperate and "deranged state.*

"This being the case (of which I will in due time commu- "nicate more), and as we have claims, and they from natural "right are certainly entitled to a priority, I think in justice "to ourselves they ought not to be overlooked; and on you, "as representative of the family, the guardianship of this "right will devolve. I mean the dowry left to our mother, "with interest, the interest on the advances by our father "during the war, the commission for his agency in accepting "and paying bills, and likewise as factor for the estate, on the "rents, etc. All these are proper and legal claims, and ought "not in right to be set aside and put into the pockets of "others. I would act with strict propriety, nor would I "swerve one degree from that justice which devolves as a duty "on every honest man, but I would carefully watch over "those rights that become our inheritance in common with "the rest of mankind. These are my ideas, and I well know "that yours will fully co-operate. I am placed in a situation "extremely delicate and unpleasant. I have interests of my "own to watch over, and I have likewise those in opposition "to them, as an executor, to promote. These must be recon- "ciled as much as the nature of the thing will admit, and the "sacred duties devolving on me will be fulfilled as far as I "am able with justice and a regard to truth and rectitude.

"Yours is likewise extremely so as agent for his heirs, and "as representative of those who have claims that counteract "them; but you must reconcile them to the best of your

"ability, holding in view the sacred and unerring principle of "truth and justice.

"This is a situation we never could have contemplated; "but it is a part of that thorny path that we must all en- "counter through life, and we must meet it with a fortitude "proportioned to its magnitude.

"Mr. William Patrick and Mr. Robert Shedden, junior, "are both absent in Virginia. I have wrote to them both, "and expect them in a few days.

"Should this vessel not go off for a little time I will make "some additions. In the meantime believe me to be, very "affectionately, dear William,

"Yours,

"JNO. PATRICK."

"P.S.—The contents of this you will of course only com- "municate to those who have an interest or in whom the "necessary confidence can be reposed. I shall not have time "to write my sister by this ship, but will by the next."

"Evening of 9th November.

"I have just to say that our friend's disorder advances with "gradual progression; every hour wafts him nearer to eter- "nity. But amidst this gloom I have inexpressible pleasure "in adding that he bears his situation, which is as trying a "one as can possibly fall to the lot of human nature, with "that greatness of soul, and with a composure, recollection, "and resignation, that extracts the greatest reverence and "admiration from all who have an opportunity of approach- "ing him. Indeed, he shines under the shade of death "greater if possible than when in the sunshine of prosperity. "He has a heart pure and untainted; his memory with me "will always be held in the most reverential remembrance. "Oh, could I but imitate his virtues, while I could divest "myself of those foibles that have unfortunately thrown a "momentary shade over a character that would otherwise

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

"have been unsullied, and a memory that would have defied "the shafts of malice! but such perfections are not be met "with in this sublunary world. He is reconciled to his fate, "has made his peace with his Maker, resigns himself to "His bosom, and dies a man and a Christian.

"Excuse this effusion. I could say much more, but I am "overwhelmed in sorrow. Adieu.

"J. P."

"November 11th.

"In the morning Mr. Shedden gradually approached his "end. He has looked into his affairs, and wrote to his "friends.

"He has two important letters to write, and he dies con- "tented. One is to you respecting his children, etc. The "boy is to be sent to Scotland. I will be glad if you will "keep that part of my letter to yourself which is compre- "hended between the mark *. I may be mistaken; I should "be happy was it so.

"J. P."

"I requested him if possible to write to my brother Robert; "his susceptible heart I know would be much gratified.

"J. P."

Mr. William Shedden died on the 13th of November, 1798, which event was communicated to William Patrick, W.S., by letter dated New York, November 18th, 1798.

There were also tendered in evidence letters from William Patrick, of Virginia, to Miss Jane Shedden, of Beith, in Scotland, dated New York, 8th of December, 1798. From the same to the same, dated New York, 22nd of February, 1799. Other letters of John Patrick to Robert Shedden, of London, from New York, in the month of November, 1798; from Robert Shedden, jun., dated New York, 11th of December, 1798, to Robert Shedden, sen.; and other similar ones, all containing allusions and declarations respecting Mr. William

Shedden's deathbed, marriage, and previous cohabitation, to the same effect as the statements in John Patrick's letter of the 9th of November. 1860. Nov. 9 to 27. SHEDDEN v. PATRICK.

It was admitted that, as declarations of members of the family in a question of legitimacy, they were admissible if made *ante litem motam* (*Berkeley Peerage Case*, 4 Camp. N.P.); THE COURT observing: "We cannot find, since the "*Berkeley Peerage Case*, that the fact of the *lis* being known "or not known to the person making the declarations would "affect the admissibility. Any doubt on this point can only "have arisen from a note in the 3rd edition of Taylor on Evi- "dence, p. 520."

Mr. Phear objected to the admissibility of the letter of the 9th of November, 1798, and the others, on the ground that a letter from William Patrick, W.S., of the 31st of December, 1798, in answer to that of the 9th of November, 1798, showed that the declarations sought to be used were not the natural effusion of unbiassed and even minds (Wood, B.'s opinion in the *Berkeley Peerage*). He cited the description of Alderson, B., of the commencement of a controversy (in which sense *lis mota* was to be taken in such cases), as being the arising of a state of facts on which the claim is founded, without anything more (*Walker* v. *Beauchamp*, 6 C. & P. 552). November 20.

BY THE COURT: That opinion was repudiated by Sir Edward Sugden when Lord Chancellor of Ireland. (See *Reilly* v. *Fitzgerald*, cited 3rd edition of Taylor on Evidence, p. 516.)

The Court, without calling on counsel on the other side, proceeded to express their opinion.

THE JUDGE ORDINARY: The declarations are admissible; the letter by John Patrick of the 10th of November was commenced three days before the death of William Shedden. We

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

cannot carry back the letter of William Patrick of the 31st of December to that date. We must judge of the feelings of the party from what he knew at the time, and when it is said that there was then *lis mota*, I am of opinion that that means a controversy about that which is the very subject-matter of the action in which the evidence is tendered. Now there was then no controversy as to the deathbed marriage, or as to the fact that William Shedden and Ann Wilson had lived together previously.

WIGHTMAN, J.: The whole of Mr. Phear's argument was founded on certain expressions of Alderson, B.; but the cases decided since establish that there must be not merely the existence of facts which may lead to a suit, but an actual controversy; and secondly, that if a controversy exist, it must be on the very point in respect of which the declarations are sought to be used. Now, as far as we know, down to about 1850 there was no question as to any marriage previous to that of the 7th of November, 1798.

WILLIAMS, J.: I am of the same opinion. The point is quite clear; the controversy which is to exclude such evidence must be controversy in respect of the very point in dispute; it is quite immaterial that there has been controversy, even litigation on kindred matters, if the point itself has not been raised. The learned Judge referred to *Freeman* v. *Philips*, 4 M. & S. 486; *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 280, Parke, B.'s judgment.

Subsequently, in the course of Mr. Rolt's summing up, the Court said that a letter of William Patrick, W.S., to the executors, of the 18th of September, 1800, showed that the matter[1] was then in dispute between the parties. Parol evi-

[1] This letter of William Patrick, taking the deathbed marriage as a fact, pointed out that it was extremely doubtful whether, under all the

dence, partly *vivâ voce* and partly taken by commission in New York and in Edinburgh, was produced on both sides. That from New York chiefly with the view to prove or disprove a marriage by cohabitation and repute. The Edinburgh evidence was chiefly that of William Patrick, the party cited.

The following letter from William Shedden to William Patrick, on the genuineness of which the judgment of the Court principally turned was, as printed by the parties cited, in the following terms:—

William Shedden of New York, to William Patrick, W.S.:

"New York, 12th November, 1798.

"My very dear Nephew,—My long and painful illness must "apologize for my long silence. I am now going to quit this "world; I have married Miss Ann Wilson, which is approved "of by my friends here, and which restores her, and two fine "children I have by her, to honour and credit. I have set- "tled all my affairs, and appointed executors here, who will "correspond with you. One of my children is a boy, named "William Patrick Shedden; they are charming children, he "in particular. I have ordered my executors to send him to "you. I now remit first of Griffith and Walrond's exchange "on Messrs. Thomas Daniel and Co., London, dated Barba- "does, 23rd of June, at sixty days, for £326. 15*s.* 8*d.*, and "first of B. Farquharson and Co., on Barclay and Farquhar-

circumstances, it would effect the legitimation of the children; that as regarded the real property in Scotland, his brother Robert Patrick's interest was directly opposed to that of the children, and that the question must necessarily be settled by a lawsuit.

It is presumed that this ruling means that the legitimacy of the children was the real point of controversy, and not, as suggested by the remarks of the learned Judges above, the deathbed marriage, which was only one piece of evidence tending to prove or disprove, according to the law applicable to the case, the legitimacy of the children. All the letters however to which Mr. Phear's objection was taken, bore date before the 18th of September, 1800.

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

"son, London, dated Martinico, 21st of July, at sixty days, "for £91; altogether £417. 15*s*. 8*d*. sterling: and I desire "that such further sum or sums of money may be appropri- "ated for the purpose of maintaining and educating him gen- "teelly and according to his talents and inclination, not ex- "ceeding £500 sterling, without the consent of my executors, "of whom you are to be totally independent in this business. "I can only add, that I remain till death, dear William, your "affectionate uncle,

"WILLIAM SHEDDEN."

This letter and the first of exchange were, according to William Patrick's evidence, received by him in due course of post, and also two copies with second and third of exchange, in the handwriting of William Shedden's clerk—the original was not forthcoming: William Patrick said he had sent it, with other documents and letters, to William Patrick Ralston Shedden in October, 1823, and had not received it back. William Patrick Ralston Shedden admitted the receipt of certain documents in October, 1823, but alleged that he had returned them.

Mr. Rolt, in summing up for the parties cited, contended that three distinct points had been clearly established, any one of which was conclusive against the burlesque evidence tendered on behalf of the petitioners to establish the affirmative of the issue which lay upon them. First, the documentary evidence, especially the deathbed letter of the 12th of November, 1798. Secondly, the fact that William Patrick Ralston Shedden in 1848 proceeded in the Court of Session in Scotland, and in that year he solemnly averred an intimacy and connection between his father and a Miss Ann Wilson, and that his father, on his deathbed, married her with the view of legitimating the issue born previously; the previous marriage by cohabitation and repute, now relied upon, was first heard of in the supplementary action in April, 1849; and yet from 1833 to 1848 William Patrick Ralston Shedden had been in com-

munication with several parties who knew all the history of the last years, and all the facts and circumstances of the death-bed of William Shedden. Thirdly, the parol evidence produced by the parties cited proved the terms on which William Shedden and Ann Wilson had lived, and that they were not those of man and wife.

The Hon. R. Bourke, for the Attorney-General: The case is important, as a precedent for the conduct of the law officers of the Crown in similar petitions. The petition concludes with a twofold prayer: first, that the elder petitioner should be declared the legitimate son of certain persons; and, secondly, that he should be declared a natural-born subject of her Majesty. The latter is the point of public importance, and is a question of personal *status*, distinct from any capacity to inherit or succeed to either real or personal property. If the parents of the petitioner were unmarried at the time of his birth, he is no British subject (*Rose* v. *Ross*, 4 Wills. and Shaw, 296–7, App. No. 4, p. 57). If his parents were married at the time of his birth, he was a natural-born British subject. His father was a natural-born British subject, and there is nothing to show that his allegiance was dissolved. By the statutes 7 Anne, c. 5, and 4 Geo. II. c. 21, the petitioner would be a natural-born British subject, unless the treaties of 1783 and 1794 with the United States of America interfere. In the latter it is provided that all persons who should continue within the limits of the United States of America till 1794, should be considered as having elected to become citizens of that country; but this can have no bearing upon the *status* of the petitioner's father in 1794, when he was born. As to the first part of the prayer of the petition, we are content to leave it to the Court, subject to the observations of the learned counsel for the petitioners and party cited.

Mr. Collier, on behalf of the petitioners, admitted that if the

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

deathbed letter were genuine, and written at the time, there was an end of their case; and if they had thought it genuine they would never have brought the petition: but if not genuine, he should contend that it almost destroyed the respondents' case. The learned counsel then commented with great minuteness and ability on the evidence before the Court, and contended that it entitled his clients to a sentence in their favour.

THE JUDGE ORDINARY: We have now arrived at the last stage of this very singular inquiry—an inquiry from the length and complexity of which it must follow that the Court have felt that a very considerable degree of responsibility was cast upon them. Two or three circumstances have somewhat diminished that feeling. The first is, that the evidence having been given somewhat slowly—that which was material intermixed with that which was not—they have had abundant time during many days to consider and to discuss that evidence which was material, and which they felt had a bearing upon the true point to be decided. Another circumstance which might have embarrassed them very much was that the female petitioner for a considerable time was left without the assistance of counsel to conduct the case on behalf of herself and her father; but the perfect and intimate knowledge which she displayed of every single fact, material and immaterial, connected with the history of these people, and the singular tact and dexterity which she showed in managing the case as presented to the Court, relieved us from any apprehension that, for want of the aid of counsel, her case might not be presented sufficiently before us, and that, from want of sufficient assistance from the bar, we might be likely to fall into some error. Towards the close of the case she had an opportunity of bringing some evidence before us, and of having the whole commented upon very ably by an experienced counsel. These circumstances, therefore, have

relieved us from a good deal of the anxiety we might have been expected to feel in the case; and still more are we relieved from anxiety by the perfect union of opinion that exists in the Court; and we feel that we have no nice question of balanced evidence to decide, but we have been enabled to come to the most clear, unhesitating judgment as to the decision which we ought to pronounce.

The question that we have to deal with is a simple question of fact, namely, whether a marriage, in fact, was solemnized —either with or without religious rites—between the father and the mother of the first petitioner before he was born? and having acted as Judges during fourteen days in this matter, we now have to discharge the functions of jurymen, and return a verdict upon that question of fact. But we have not the privilege of dealing with it in all respects as jurymen, and giving simply a verdict of aye or no. We feel bound to state our reasons, and our views of the evidence which have brought us to the conclusion we are about to pronounce. In dealing with the matter, I desire to say that the reasons I give are my own only,—my learned brothers will add such reasons for themselves (which perhaps may controvert and repudiate some of mine) as they may think fit. I am about to state the reasons that have led me to the conclusion at which I have arrived. They will not be very long, and the facts are not very numerous upon which I think this case turns.

Now, the first part of the case, namely, the alleged marriage in fact, depends entirely, as far as the petitioners are concerned, upon the evidence given for them, which is confined entirely to what is called habit and repute. No attempt was made to prove by direct evidence any marriage between these parties; but it was said, at this distance of time, some seventy years after the marriage is supposed to have been contracted, it is not to be expected that these parties can bring forward better evidence than they have; they say "we

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

bring forward a *primâ facie* case, which it is very difficult for you on the other side to rebut." The first thing the petitioners admit they have to account for is, why this marriage should be private, or rather not private, but secret. Why should the marriage be secret? I suppose if a marriage was intended to be private in America, where it was not necessary to solemnize the marriage in a church, it would be as private with the presence of a clergyman as without. But what is the reason given for any privacy or secrecy in the matter? Why, that Mr. Wilson, the father of the lady, disapproved of the match, because the difference of their ages was too great. That is the reason assigned now. It is suggested that as soon as they married they cohabited together as man and wife, and lived together from that day down to the period of William Shedden's death; were received in society, visited by ladies, and visiting ladies of the most respectable class; and that, therefore, there could be no doubt of that marriage. But what a strange reason to give for keeping the marriage secret and private! Would the father be more reconciled to his daughter's cohabiting with William Shedden because he thought she was not married, or did not know that she was married? It does appear to me to be one of the strangest reasons that ever was assigned for having a secret unacknowledged marriage when the parties were cohabiting together as man and wife. But it is well to observe whether the parties have always been in the same story about that; whether any other reason for secrecy or privacy in the marriage has ever been given. Now, in one of the letters of the petitioner—that of the 14th of June, 1839—I do find another reason assigned. He asserts a former marriage, but assigns a different reason for secrecy. It is a remarkable letter, and to be duly understood, the whole of it should be read and considered. It is a letter written when he was in angry controversy with William Patrick—when he is repeating to William Patrick that all his father had said and desired

to accomplish by the last marriage, and relying upon his undoubted wish that he, William Shedden, the petitioner, should be made heir to the Scotch property. That is the scope of the letter, and therein he deals with this matter of a former marriage. There had been a negotiation between William Patrick and William Shedden, after he returned from India the second time, for enabling him to possess that which was the great object of his ambition, the Scotch property. Some terms had been proposed, but William Shedden did not choose to accede to those, and he writes thus upon the subject:—"Now one would have thought, as there was no house or garden, or lodge or grounds about the property, no stranger would have given more than from twenty-eight to thirty years' purchase," and so on, and then he objects to give that. Then he says, "I would have given you so much, and therefore there would have been no favour conferred upon me, and I was ready to give it, particularly"—now, here is a curious passage in the letter, very curious—"particularly as it is likely that no other person knowing my claims would be anxious to have it, or, at all events, without an indemnity bond; for although I am not able to establish just now my father's first private marriage, which I have given you notice of, what is known already would not be in your favour, and I conceive it to be my duty now to inform you, that my sister told me it was really the case that my mother was a respectable young person living with her parents upon a small farm on my father's land, and he did not acknowledge the marriage publicly on account of her humble birth, but nevertheless he always treated her as his wife." Is that so? Then what becomes of this being a marriage which was to be kept private because the father thought he was too old a husband for her? He now says, everybody in New York knew it, but then his statement is, that his father "did not choose to acknowledge the marriage publicly, because of her humble birth." And this is a letter written by the man

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

who, to-day by his counsel, and on former occasions, has declared solemnly that until the year 1848 and 1849 he never had the slightest intimation of any former marriage supposed to have been had between his father and mother! What are we to think of such a man? But that is not all—"Nevertheless, he always treated her as his wife, and Mr. Robert Shedden informed me that he found her at the head of my father's table when he went to America;" which is not inconsistent with the evidence now given, for the earliest account we have had about Robert Shedden going to America was that he was there a few months before the man's death, when that bond was executed. "Moreover, my sister told me in 1829, when she mentioned these circumstances"—his sister had told him that in 1829, ten years before this letter—"that a woman was still alive who was present at the private marriage." I take that for what it is worth—an assertion that he had heard that from his sister; I shall have occasion to observe presently upon that part of it. But take those two opposite reasons, assigned at different periods and for different purposes, for the marriage being kept secret. Does it increase one's confidence in the evidence of habit and repute? Against that evidence of habit and repute set the evidence of Mr. Neilson, who certainly does not go into particulars, but merely says he was reputed to be a single man. Mr. Neilson was of much greater age than most of those who spoke on the other side; he had no interest at all; he was older at the time, and had as good means of knowledge. There is also the evidence of John Barr. John Barr must have known the circumstances, and, unless he was a perjured man, his evidence is exceedingly strong. Well, if the case had rested there, I for one might have felt a little embarrassed as to the judgment I should pronounce. I cannot tell what would have been my opinion if there had been no other evidence, because my mind may now be influenced by the other evidence unknown to myself. As far as I can

judge, it would have been that there was no such evidence given of the affirmative of the marriage as to warrant a judicial conclusion that any marriage had taken place.

But I now come to the second marriage. There was an undoubted marriage in fact when the man was on his deathbed on the 7th November 1798. Now, what are the reasons suggested for his marrying then? It could not be to make reparation for any wrong that he had done to Ann Wilson, because, according to their theory, he had done no wrong at all. It could not be, I think, that which Mr. Collier suggests, a religious scruple. I can perfectly understand a religious scruple having come across his mind as to marital intercourse without the sanction of the church, and if he was contemplating a continuance of it, that might form a reason for the marriage being solemnized at that time; but he knew that that was at an end, and it is absurd to suppose that he would have married then in order to sanction that which he had done years before. Therefore it could not be that. Then what reason remains? Why, it is suggested that he wanted a marriage more easy of proof. But it could hardly be more easy of proof. All New York knew of the other. The lady's father was living; Dr. Hosack, the particular friend and physician, was living; Mrs. Hamilton, described by one of the witnesses as a "particular crony" of Mrs. Shedden, was living; Judge Pendleton, whose acquaintance they boast of, was living. Where could be the difficulty? Why, the man himself was living, and might have made a declaration which would have been conclusive. Therefore, I think it is quite absurd to put it upon that ground. What, then, is the ground? To make his children legitimate. And that is the ground which, as long as it suited his purpose, was adopted by the petitioner himself. Throughout this long letter of the 14th of June 1839, the argument is —"You know perfectly well that your uncle married my mother in order to make me legitimate and the heir to the

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

Scotch property, and yet, in defiance of all that, you basely avail yourself of a technical objection in order to get possession of it for your brother Robert;" and that beyond all doubt was his case. Well, then, in addition to that, you have declarations of John Patrick, the declaration of Robert Shedden, declarations of William Patrick of Virginia, all to the same effect, repudiating a former marriage, saying there was none until this marriage was solemnized.

I now come to the letter, the important letter of the 12th November 1798, and it is admitted by the petitioners, that if that was a genuine letter, there is an end of the case. Now, let us inquire a little into the probability of such a letter having been written. It was said by Mr. Rolt in his argument, that if John Patrick and William Patrick of Virginia and Robert Shedden wrote to different people stating that there had been no previous marriage, when in fact there had been one in 1790, that marriage must have been known to the friends in Scotland. They had correspondence with the Patricks in Scotland, and with the Sheddens in London. Mr. Collier argues, on the other hand, that it does not follow that they would know it; very likely they would know nothing at all about it. I think that is exceedingly improbable. The Scotch families are somewhat particular about their pedigrees—somewhat proud of them. Mr. Shedden of New York was the owner of the old Roughwood property, which had been long in the family, and of the possession of which they were proud. Would it not be made known to the members of the family that there was a marriage, and children born of an acknowledged marriage? Would they never have heard of it? It is quite incredible. One must judge of things somewhat according to probabilities and one's intercourse with the world. But assume, according to Mr. Collier, that it was not known, and I dare say it was not, that he had had these children,—is it likely, assuming that he married at that time for the purpose of making the chil-

dren legitimate, that the letter of the 12th November would be written? If I mistake not, he appointed by his will William Patrick as guardian of the boy. But this reminds me that I have omitted one reason which was assigned in the opening as a reason for solemnizing that marriage, and it was this,—that the testator had discovered some grounds for suspecting a conspiracy to deny the former marriage, and therefore, to make all sure, he had it solemnized again with ecclesiastical forms. If there was such a conspiracy, who were the parties to it? Who could be the parties in it? Who had an interest or a motive? Why, it could only be John Patrick, with William Patrick or Robert Patrick in Scotland, in order to advance their interests. Is it possible that such a thing can be suggested? Here is a man on his deathbed discovers that his nephews have entered into a fraudulent conspiracy to cheat his children of their inheritance, and immediately he makes the fraudulent nephew in America his executor, and the fraudulent nephew in Scotland the guardian of his child. Why, it is too absurd a supposition to be entertained for a moment. But as to that letter, is it likely that such a letter would be written? If he had married then, to make that child legitimate; if he had not avowed the existence of that child before; if he had not communicated with his nephew, the Writer to the Signet, or Dr. Robert Patrick, before;—is it likely that he would make a will appointing a guardian to the child,—having, as he supposed, legitimated him by the marriage,—and send him over to that guardian in Scotland without any communication from himself? Is it not likely that he would give the guardian some intimation of it; that he would write something to show that he remembered him, and to bespeak his kindness to the child? Therefore, it seems to me that there is every probability that some such letter would be written. But to what a theory are we driven in order to suppose that no such letter was written? Why, to get rid of the effect

1860.
Nov. 9 to 27.

SHEDDEN
v.
PATRICK.

of John Patrick's letter of the 9th November 1798, they say that he had very artfully written that letter to pave the way for a forgery to be subsequently executed of a letter to be sent in the name of William Shedden to William Patrick. Now, in the first place, let us see what the effect of that letter is, in respect to the opinion that John Patrick himself had, as to the consequence of what his uncle had done. He speaks of his having married; states that he had married; states that his object in that proceeding was to rescue from a state of bastardy, and introduce into the world with all the privileges appertaining to those who are born under the influence of the law, two infant children,—evidently alluding to the right of inheritance. Well, then, he speaks of its being a hard struggle, but that he had done it. He then speaks again of the other girl, who is said to have been an illegitimate child by another woman. "Besides the two children mentioned, he has one other, a girl of about twelve years old, by another woman, who is long dead, his very image, but who can reap no benefits from the measures taken, being considered in the eye of the law a bastard." He therefore distinguishes between her *status* and the *status* of the two who were to have the benefit of the marriage which had then been solemnized. He again mentions certain claims upon the estates which he thought his brother William ought to take care of, evidently supposing that the estate would pass into the hands of the boy; and after speaking of the delicate position in which he was placed as an executor, he says, "This is likewise in your situation extremely so, as agent of his heirs and as representative of those who have claims to counteract them." He, the writer, is made agent for the girl, but William Patrick being appointed guardian for the boy, he has these family claims to take care of, which are claims upon the estate. It is therefore very plain that John Patrick at that time supposed that the marriage was effectual to give them all the rights of legitimate children.

He knew that his uncle had made a will disposing of all his American property; then what possible motive could he have for entering into any conspiracy to send a forged letter? But it is supposed he had, because otherwise it is difficult to get rid of the fact of the postscript of 11th November:—"In the morning Mr. Shedden gradually approached his end. He has looked into his affairs, and wrote to his friends. He has two important letters to write, and dies contented. One is to you respecting his children, etc. The boy is to be sent to Scotland." Then in a postscript he says, "I requested him, if possible, to write to my brother Robert; his susceptible heart, I knew, would be much gratified," assuming, that from his exhausted condition, it was doubtful how much he would be able to write,—I say, therefore, there was every reason to suppose that such a letter as that of the 12th November would be written.

Well, then, we have had produced to us two letters, which purport to be copies, which are called duplicate and triplicate; and I have the duplicate in my hand, in which he says, "Original by the ship Fanny, *vid* Greenock." Rather a curious concoction of a letter this, if it was a fraudulent pretence that there was an original; that this duplicate should be prepared in this manner, "Original by the ship Fanny, *vid* Greenock. New York, Nov. 12th." Then, as this is supposed to be from the man himself, there is the name "William Shedden," and, curiously enough, there is the word "signed" against it, which, you know, is the constant practice; in making a copy, you put "signed" against the name, to show that it is not meant to pass for an original signature, as instead of the seal you have "L.S.," to show the position of the seal; and then we have by the side, "Attested, John Mills." If this was a fraudulent pretence, it is necessary to suppose that John Mills was a party to the fraud, was a party to the concoction of this fabricated letter, he asserting by that which he writes that the original

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

was sent by the ship Fanny, and that this was a duplicate of it; he attests the correctness of the duplicate. So likewise John Mills attests the correctness of the triplicate, he being a person ascertained to be in the employ of the testator, William Shedden, because by his will he left him a legacy. Now, this triplicate begins also, "Triplicate; original by the ship Fanny; duplicate by the Amsterdam packet." This part of the assertion is proved to be true, "duplicate by the Amsterdam packet," because there is the duplicate which came by the Amsterdam packet; therefore some part of this statement is true. Then, is it not monstrous, where we have no imputation upon John Mills, no reason to suspect him; no surmise against his character of any kind or description; when it is proved that the testator had had some regard for him, by remembering him in his will; that the man is to be supposed instantly, without motive, without anything to induce him that we know of, to enter into this combination with John Patrick, to assert a gross and abominable falsehood, viz. that there was an original letter, of which these two were the duplicate and triplicate? Well, then, what was the course of business in that day? Why, to send bills in three parts. I believe it is somewhat altered now. I believe it is not very common to go beyond a duplicate, but at that day it was almost invariable to send three parts, one being enclosed in each letter; and therefore you have the course of business to confirm that which is so stated. But I think that there is the strongest internal evidence of the truth of the story, that this was William Shedden's letter, and not a letter fabricated and concocted by John Patrick. Observe what is said to be the motive. It is to lead people in Scotland to conclude that he never had been married before—in fact, that it is to operate as a denial of a former marriage. Now, what are the contents of it? "My very dear Nephew,—My long and painful illness must apologize for my long silence. I am now going to quit this

world. I have married Miss Ann Wilson, which is approved of by my friends here." That is a truism; John Patrick did not invent that in order to cause it to be believed in Scotland that he had married Miss Wilson. That could be proved by plenty of people. There was no doubt about it. "And which restores her and two fine children I have by her to honour and credit." Now, the whole pith of the letter is in the word "restore." There is nothing else which by inference would lead you to conclude that he meant to say that it was necessary to "restore" her—that there was some need for a restoration—that she had lost honour and credit before, but that that was to "restore" her. John Patrick must have been very cunning, if he invented this letter to operate as a denial of any former marriage, to hit upon that word "restore," so that people might draw that inference from it, and not make a direct statement of it. It is inconsistent with human nature to suppose that a man so dealing with the subject, and with such a transaction, would not have made some positive statement of the fact in such a letter—"I have hitherto lived with Miss Ann Wilson as my mistress, but I have at last married her." Here the whole point of it is in the word "restore." There is nothing else in the letter but facts known to everybody—mere truisms, about which there could be no controversy or dispute. He goes on—"one of my children is a boy named Willam Patrick Shedden"—showing, therefore, that which is consistent with all one expects to be the case, that the existence of that boy, the illegitimate child, had not been made known to his friends in Scotland before, and therefore he told him his name; and then he speaks of having sent the Bills of Exchange, which the petitioners have proved had duly arrived, by introducing Mr. Patrick's book in which the receipt of the bills, and of the payment of the bills afterwards when they were due, is acknowledged. Then, "I desire that such further sum or sums of money may be appropriated for the

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

purpose of maintaining and educating him genteelly and according to his talents and inclination, not exceeding £500 sterling, without the consent of my executors, of whom you are to be totally independent in this business. I can only add, that I remain till death," &c. This, again, is exactly consistent with the will; the daughters were to be under the care of the executors, the elder one absolutely, the younger one as soon as the mother ceased to obey their instructions and to act according to their wishes in reference to her. The boy was handed over to Mr. William Patrick as his guardian. What is there against that? What is there to lead us to doubt that such a letter was written? What is the improbability of it? Why, it is not produced. It cannot be produced. The letter was received in January 1799. But before I go to that I must advert a little to Ann Wilson's letter, which sometimes has been relied upon, and then been repudiated by the petitioners—the letter of the 3rd September 1799, which is legitimately in evidence, and we will see what she says about it. "On looking at my signature, you will of course find that I am a stranger to you, but when I inform you that I am unfortunately the widow of your late uncle, William Shedden, Esq., of this place, I trust that you will listen to the contents of this letter with that attention which the memory of your late uncle, and the interest of his son, is in my opinion fully entitled to." Then she talks about the loss of her husband, and so forth. "My worthy husband made his last will and testament some time before his death, making settlements as far as he could, and appointed executors for fulfilling his intentions. He also at the same time wrote your brother William in the most affectionate terms, recommending our son William to his guardianship and protection, and made a remittance on account of this infant, the view being to send William to Scotland for his education." She speaks incidentally of that letter. "He wrote to your brother

William in the most affectionate terms." What, was she, on the 3rd September 1799, concocting evidence in order to establish that such a letter was written, or was John Patrick doing it? The theory is, that this letter was forged by John Patrick, or by some of his wicked associates. Assume that John Patrick, on the 3rd September 1799, was actually writing this letter for the far-fetched purpose and object of giving some collateral evidence of the existence of such a letter as that of the 12th November, and I think you will assume one of the most preposterous propositions that ever was presented to the consideration of rational men. It is absolutely absurd and ridiculous. If genuine, it proves that she not only knew of such a letter, but knew the contents of it. She states them correctly. Her husband had written to William Patrick in affectionate terms, and recommended their son to his care, and made a remittance for the purpose of his education. Well, then, the letter is not produced. What has become of it? What does Mr. Patrick say? Mr. Patrick says, "I gave it to William Shedden, the petitioner; I never got it back again." Then we have produced a list of papers which are admitted—at least the greater part of them—to have been at one time handed to William Shedden. The date of the list is the 7th October 1823. I do not say that that is positively so, but it is a list of papers that purport to have been sent to him on that day; and the clerk, Mr. Love, says that, according to the course of the office, no doubt that list was made out, and he made a copy at the time the transaction took place. Now, how came this list to be made out? It appears that this gentleman, the petitioner, returned from India in 1823, and that then Mrs. Robert Patrick observing that he was wholly ignorant of his family and his *status*, and who he belonged to, as far as family connections were concerned, revealed to him the secret of his birth. He became much excited, very angry, and entered into a violent and angry controversy with

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

Mr. Patrick on the subject. He says, Mr. Patrick, by various specious arguments, sought to pacify him; and great imputation has been cast upon Mr. Patrick on account of his having never communicated the secret of his history and his birth to this young man before he went to sea or went to India. Whether that was right or wrong—whether there was anything blamable in that or not—must depend, I think, mainly upon whether Mr. William Patrick had acted faithfully towards him or not. If he had acted faithfully—if the question respecting his rights had been fairly and honestly brought forward and tried, and the decision was in favour of Robert Patrick and against the petitioner—if the executors in America had acted faithfully, and had not robbed him of his estate,—and there were three executors, not only John Patrick, but Dr. Hosack and Mr. Farquhar, and Mr. Farquhar appears to have acted as well as Dr. Hosack, for in Mr. Farquhar's possession the papers belonging to the deceased man were found,—why, then, I say, if they had acted faithfully, was there anything unkind or unworthy in keeping from the knowledge of this young man that he was illegitimate? Would he go to sea amongst his young comrades in the navy, or would he associate with young men in India, with any more freedom or satisfaction, with any more consciousness of the dignity and position of an honest young man, because he thought he was a bastard? Would it have added to his happiness to have known that circumstance? Would it have been likely to advance his pecuniary interests or his personal interests, or to gratify his personal feelings to have known it? If not, assume that he was faithful in discharging his trust, and I do not see what imputation is to be cast upon Mr. Patrick for not making the communication. But, at a certain age, it seems that Mrs. Robert Patrick thought it right that he should know who and what he was. Then they entered into this discussion.

Now, it appears that in order to give him information,

these papers were given to him for perusal—Mr. Patrick says all; the petitioner says not all, most of them. First there is a letter of John Patrick of the 9th, with postscript of the 11th November, 1798, regarding Mr. Shedden's affairs; second, a letter of the 18th November informing him of Mr. Shedden's death; and I think it was in that same letter of the 18th November—if not, it was a letter about the same date of John Patrick's—in which he says, "I send you a newspaper containing the announcement;" and very probably the obituary in that newspaper is the one afterwards referred to, which possibly contained some complimentary notice of the deceased—"with newspaper of the 14th November," intimating the date and as having given it at that time; "third, probate of the will of William Shedden; fourth, letter from William Shedden to William Patrick of 12th November, 1798, enclosing two bills of exchange, amounting together to £417. 15*s.* 8*d.*; fifth, letter of John Patrick of the 8th December, 1798, with a copy of the letter of the 18th November prefixed." Now, I should remark upon this "fourth,—letter from William Shedden to William Patrick of the 12th November, 1798, enclosing two bills of exchange,"—that what seems to be considered the important part at that time was the enclosure of the bills—the money that was sent for his son's use; and whether that was meant as the original, or the duplicate, or triplicate, may be left very fairly in doubt. Nothing more is heard of this. Mr. Shedden says, "Whatever papers I got" (he acknowledges having received papers in the letter of the 14th October) "they were all returned." I think it is very probable they were. But then some papers were sent back again to him before the 3rd of January, 1824. I assume he sent them all back as he says, but there must have been a subsequent transmission of something to him, as appears by the letter that he wrote on the 3rd of January, 1824:—"Dear Sir,—On my arrival last night from the west country, I received your

1860. Nov. 9 to 27. SHEDDEN v. PATRICK.

letter of the 31st ultimo" (if that letter had been produced it would have set this question at rest); "and I have to thank you very sincerely for the letter of my father's to you and the obituary." .I assume they were all sent back in 1823. Here, in January 1824, he got the obituary again, and a letter of his father's also. It appears that Mr. Patrick wrote in the margin of this list against the letter of the 12th November, "Not returned." That was written, as far as has been ascertained, in the progress of Mr. Carment's examination of the papers in the suit of 1848, twenty-four years after the transaction, Mr. Patrick then approaching the age of eighty. It is possible, his attention not being particularly drawn to the subject, that when he was asked, as he would be by Mr. Carment, "What about the letter and obituary? we cannot find these," he may have said, "Oh, those were not returned when he sent the others back again." But there is this expression in the petitioner's letter of the 3rd January which Mr. Collier very properly noticed, "As I had never seen my father's handwriting before, you will easily be assured that this is a dear relic to me." That only operates to negative the fact that he had his father's writing or signature in the month of October before. I think it is very strong to show that. But how do you account for that? Why, the letter of the 12th November put down in the list was originally sent for the purpose of showing the bills enclosed—nothing is more probable—without distinguishing between the original and the duplicate. The whole were sent to give him information about his affairs and his *status*; they were returned; and afterwards, for some reason which was probably assigned in the letter of the 31st December,—which the petitioner would have, as it was his, and if it has been lost it is not the fault of the respondent,—the original and the obituary were again sent, for we find him, on the 3rd January, 1824, acknowledging the receipt of a letter from his father to William Patrick and the obituary, and thanking

him for the letter, as probably containing nearly, if not absolutely, his last signature. Now, how did Mr. Patrick become possessed of his last signature? John Patrick says, on the 11th November, "William Shedden has two letters to write, one to you about his boy." Only one to him. If, therefore, he had the last signature, it must have been that one. I apprehend, from this examination of this part of the evidence, no reasonable man can doubt that that letter did go to him at that time. Mr. Shedden denies it. Can we rely upon Mr. Shedden's evidence in this matter? Mr. Shedden has denied, both in the House of Lords in 1854, and in his petition presented there after the suit was over, and through his counsel to-day, that he had the slightest knowledge or intimation of his father's former marriage, or any suggestion of it, until 1849. In the petition is this paragraph:—"That your petitioner first became aware of the civil contract of marriage between his father and mother in the month of October 1849, when in New York; and he then, with the assistance of eminent lawyers in that State, collected the most satisfactory and conclusive evidence of the marriage of his father and mother previous to the birth of his sister, who was born before your petitioner."

What have we in his own letter? Why, that he knew it in 1829, and that he was told in 1829 that there was a witness then living who was present at the prior marriage. Do you think he did not inquire? If he did not inquire, he must have been perfectly satisfied that that was a false story. If he did inquire, what was the result of his inquiry? Twenty years afterwards, or thereabouts, for the first time, he set up that former marriage. Can we trust him? In Court here, upon his oath, he stated that he had never seen or heard of that document, the father's letter, until 1841. Again I refer to the remarkable letter of the 14th June, 1839, for his statement with reference to it. He is quarrelling with Mr. Patrick, not because he had denied

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

the former marriage, but because, knowing from his brother what his uncle's intentions were in solemnizing the deathbed marriage, he had defeated those intentions. He says here, "Just to think of your seeking for an American certificate, when you had received my father's own letter telling you of his marriage with my mother." What does he mean by that? What ought we to infer from it? It is open to various constructions. Taking the whole tenor of the letter, I imagine he means this: that Mr. Patrick had employed somebody in America to examine whether there was such a certificate; that he is imputing to him that he tried, if he could, to deny the existence of such a marriage. "Only think," he says, "of your sending to America for a certificate, and not being satisfied with my father's own declaration, under his own hand, that he had married my mother." That is the fair meaning. And then he goes on, "In order to annul the Scotch custom in my father's case, and his honest intention for the Scotch estate." Why, then I come to the conclusion upon this evidence, if it stopped there, that such a letter was written by the testator, that that letter was given to the petitioner, and that the petitioner has not produced it. Is it harsh to come to this conclusion? How has the petitioner dealt with other documents—the documents abstracted from the Registry in Scotland—the documents obtained from his own parliamentary agent in London, upon the assurance, the positive and solemn assurance, that they should be returned, which they never have been—the documents, through the instrumentality of Jean Shedden, burnt by Van Hook in America?

But it is said that William Patrick is not to be credited, for that he entered into a fraudulent combination with Crawfurd. It is only necessary to touch the case, and to have fraud imputed—fraud, perjury, falsehood, forgery, everything, in order to establish the legitimacy of this man by a supposed former marriage of his father and mother. This charge is

founded upon two letters from Hugh Crawfurd to William Patrick. What are these letters? How was Crawfurd introduced into the case? Remember the letter of Mr. William Patrick, the guardian, or rather the intended guardian, for he rejected that office, to the executors in America, telling them he could not take the office. John Patrick wrote, nothing doubting, that the boy was entitled to the estate; that he was rendered legitimate; that the marriage was sufficient. William Patrick writes: "I cannot take the office of guardian. This is a very doubtful point: I am inclined to think it is in favour of my brother Robert, and he is absent in the service of his country—I am acting for him—I must protect his interests—I therefore can take no guardianship of the boy which would involve me in a collision of interests of that sort; you must appoint some one to have the question fairly and fully tried." Now, what was the question which William Patrick supposed was to be fairly and fully tried? Why, the effect of that marriage solemnized on the 7th November, 1798. Then afterwards Crawfurd is appointed, but not by him. Is Crawfurd a respectable man? "Oh dear, no. He is implicated in the frauds of these other people." What other transaction of Mr. Crawfurd ever cast a suspicion upon his character or conduct? None has been suggested, but here are two letters, one of them, it appears, just about the time when the cause was determined in Scotland, the 9th July, 1803. At the close of the letter he says, "What is now to be done in William Shedden's case?" Crawfurd asks directions, it is said, of Mr. William Patrick. "What is now to be done?" he asks. Why, just to do or leave undone, as William Patrick might direct. What is the other letter he writes? The purport of it I think I sufficiently remember. He there says,—"Mr. Miller has communicated to me the judgment of the court. It is very strong. I think it very improbable that it will ever be reversed, especially in the House of Lords, for it is entirely in

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

accordance with the principles of English law. Nevertheless, I think it would be better to appeal to the House of Lords; for if I do not, the boy may challenge it—William Shedden may challenge it. At all events, I think my duty will be best discharged by appealing to the House of Lords." Now, persons who are so disposed may find in that matter of suspicion and accusation. Bear in mind it has been proved that William Patrick, on behalf of his brother Robert, engaged that if he gained the estate in that suit he should pay all the expenses. Well, then, here is Mr. Crawfurd, a respectable man, writing to him: "The judgment is a strong one; I feel confident it will not be reversed; nevertheless, I must put you to the expense of an appeal." Did it not require something like an apology? It is not in many instances that a person having a clear judgment against him, which he knows and feels to be right, can be justified in prolonging and protracting the litigation, even if he does it at his own expense, and it certainly calls for some excuse if he avails himself of an opportunity of doing it at the expense of another party. A fair and candid consideration of those letters, I think, would show they came to no more than this: "I think the judgment is right; I have little, if any, expectation that it will be reversed; but as I am watching over the rights of an infant, I think it right not to abandon his cause until the highest tribunal of the country has pronounced an opinion as to his rights." And as to the fact of the appeal being made fairly and fully, and honestly argued out in the House of Lords, it is only necessary to read that which I have read with the greatest satisfaction; that is, the wonderfully acute and learned argument then prepared by Lord Brougham[1]—I believe the only instance in which he prepared a case from Scotland to the House of Lords. It is an argument well worth reading for

[1] See 1 Macqueen's 'House of Lords Cases on Appeal from Scotland,' p. 539.

the sake of the learning and ingenuity therein displayed. What else is there? Nothing except general surmises, general accusations; the estate has been plundered, everybody connected with it was fraudulent,—Robert Shedden of London, Robert Shedden the younger, William Patrick of Virginia, and all the members of those families; nay, the petitioners have not hesitated to say that some of these unfortunate people actually quitted the world to conceal themselves and their crimes in the grave, in order to avoid exposure and shame! The only tangible thing that they mention is the bond for £4,000. They say that that was forged. We have had evidence of the handwriting of William Shedden to it. We have had the explanation of Mr. William George Shedden as to how that bond came to be given, and the reason why it never appeared upon the books of Robert Shedden and Sons. We have had evidence, given by the petitioner himself, of the handwriting of William Shedden of New York, as signed to a bill. That bond was open to inspection, and was inspected by the petitioners and one or more persons employed by them, and no person has been brought forward to say, either by comparison of handwriting or otherwise, that he entertained a doubt as to the genuineness of the signature. The charge and imputation upon William Patrick failing, the facts and circumstances already mentioned, leave me without a particle of doubt as to where the truth lies in this case. Finding, then, that the evidence to support the allegation of a former marriage is of the slightest kind; that there are such contradictory and conflicting reasons assigned for the secrecy of that marriage, and these having been given just as it suited the purpose of the party for the moment—finding that the contents of the disputed letter of the 12th November are just what you might expect to find in a true story, with reference to a marriage solemnized for the purpose of rendering a child legitimate, and with reference to the appeal to the guardian appointed by the dying man, and con-

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

sidering the manner in which Mr. Patrick has accounted for not producing that letter now, I am entirely satisfied that it was written; and without the least hesitation I must pronounce that William Patrick Ralston Shedden, the petitioner, is not the legitimate child of William Shedden and his mother, and is not a natural-born British subject.

One word about the position in which these parties are placed by the present decision.

From the manner in which this case has been conducted, and the manner in which the evidence of the male petitioner was given, I can have no sympathy with him. He may have become excited; he may have brooded over fancied wrongs until his faculty of judging was disturbed; but the course he has pursued in other matters where he had no such excuse, leaves him, I think, without any title to the sympathy of the Court.

For the female petitioner I do feel most deeply. I have no doubt she has been brought up to believe in the truth of her father's story; and from the intimate and familiar knowledge she has displayed of every particle of evidence connected mediately or immediately with the case, I have no doubt that for years and years her mind must have been devoted to the consideration of the subject. I have no doubt she has received her father's statements with the unhesitating confidence of a dutiful and affectionate child, until they have become interwoven in her very nature. And what is to be the consequence to her of this judgment? It must be one of two things. If she is not convinced by it, she will live under the harassing belief that she has sustained a grievous wrong, and is unable to obtain any remedy,—a position sad enough. If she is convinced, she will have to mourn and lament that the course of conduct pursued by her and her father has embittered the latter days of an aged man, who, for a period far exceeding the ordinary life of man, has lived honoured and respected, with his integrity unimpeached; and that she has been instrumental in submit-

ting him to a relentless persecution, carried on by means of unfounded aspersions and most unjustifiable litigation.

1860.
Nov. 9 to 27.

SHEDDEN v. PATRICK.

MR. JUSTICE WIGHTMAN: All the material evidence and circumstances in this case have been so fully stated by the Judge Ordinary in the judgment he has now pronounced, that I do not consider it necessary to do more than advert to those prominent points upon which my opinion is founded.

The petitioners in this case pray the Court to pronounce, on sufficient evidence being adduced by them, that William Shedden and Ann Wilson, the father and mother of the first-named petitioner, were lawfully married prior to his birth, and that he is their legitimate son and heir, and a natural-born subject of her Majesty.

The question is, whether the petitioners have satisfied the Court by sufficient evidence, that the father and mother of the first-named petitioner were lawfully married prior to his birth? For if they have, it is not made a question but that he was a natural-born subject of her Majesty.

The first-named petitioner was born in March, 1794, and evidence was adduced to show that before and at that time William Shedden and Ann Wilson, the father and mother, did live together as man and wife, and that they were reputed and treated as such down to the death of William Shedden on the 13th November, 1798. There was, however, contradictory evidence on this point; and it might be a question if the case turned wholly upon the presumption of the marriage arising from evidence of cohabitation, reputation, and treatment, whether there would be found sufficient evidence to warrant *primâ facie* such a presumption. Upon the whole, I am inclined to think there would; and the question then arises, whether the other circumstances appearing in evidence do not rebut any presumption of marriage arising *primâ facie* from the evidence of cohabitation, reputation, and treatment, as given by the witnesses? Wil-

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

liam Shedden, the father, was a Scotchman, and Ann Wilson an American; and on the 7th November, 1798, he then being sick even unto death, and lying upon his deathbed, married Ann Wilson, by a regular marriage by a clergyman, in due form. If he had been married before, it might be and was asked why did he marry again? And the answer suggested for the petitioners was, that it was from abundant caution, and to render proof of the marriage easier either in the Scotch Courts or elsewhere,—he having an estate in Scotland, and believing that the Scotch law as to *ante nati* would apply to his children, and render the question of a previous marriage comparatively unimportant.

Whatever weight might be attached to this reason, evidence was given by the respondents to show that a letter, said to have been written by William Shedden on his deathbed, was addressed and sent to William Patrick, one of the parties cited, dated the 12th November, 1798, which, if genuine, clearly showed the object of William Shedden in marrying Ann Wilson on the 7th November, five days previously, and is wholly inconsistent with the presumption of a prior marriage. In that letter, William Shedden addresses William Patrick, his nephew, thus:—"My very dear Nephew,—My long and painful illness must apologize for my long silence. I am now going to quit this world. I have married Miss Ann Wilson, which is approved of by my friends here, and which restores her, and two fine children I have by her, to honour and credit."

It is hardly necessary to comment upon the language of this letter. His object is stated to have been to restore her and his two children by her to honour and credit. If he had been previously married, and, as was suggested by the evidence of reputation, everybody knew it, what occasion could there be to restore her and her children to honour and credit?

They had lost none if there had been a previous marriage.

So cogent, indeed, is the inference to be drawn from this letter, that it is admitted for the petitioners that their case fails if that letter be genuine: but they assert that there never was such a letter; that the supposed copies called duplicate and triplicate are mere fabrications; and that the whole of that part of the respondent's case is founded in fraud. The case may, indeed, be said to turn upon the question of the existence and genuineness of that letter.

The letter itself was not produced before us, but William Patrick, to whom it was said to have been addressed and sent, said that he did receive such a letter, and that in 1823 or 1824 he handed it to the first-named petitioner at his request, and never got it back again, and that at the same time he handed to the petitioner an obituary in a New York newspaper. This is entirely denied by the petitioner, who swears that he never saw such a letter, and never received it. A letter, however, addressed to William Patrick is put in by the respondents, dated the 3rd January, 1824, and admitted by the petitioner to have been written and sent by him, in which he says:—"Dear Sir,—On my arrival last night from the west country I received your letter of the 31st ult., and I have to thank you very sincerely for the letter of my father to you, and the obituary. As I have never seen my father's handwriting before, you will easily be assured that this is a dear relic to me, being perhaps his last signature in this world."

The petitioner being asked what letter of his father's he spoke of in that letter of his of the 3rd January, said it was some perfectly unimportant letter, and related to a trifling transaction with some merchants at Glasgow; and being asked to produce it, said it was of so little consequence that he had it not, and did not know what had become of it. One of the copies called duplicate and triplicate was produced, and William Patrick said that it was, to the best of his belief, a correct copy of that letter.

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

Now, whether or not that letter had been handed to the petitioner in the previous month of October, and returned to William Patrick, and afterwards sent by him to the petitioner in a letter of the 31st of December, I feel satisfied that the letter referred to in the petitioner's letters of the 3rd January 1824 was no other than that letter. It seems to me impossible to reconcile the terms in which the petitioner speaks of that letter with his statement that it was an unimportant letter relating to some trifling transaction with Messrs. M'Call at Glasgow—so valueless, that he did not think it worth while to preserve it or the letter of the 31st December 1823, in which it was contained. This is very unfortunate, as a production of either of them must have thrown great light upon the subject.

It is remarkable that the petitioner, in his summons in 1848, relies upon the circumstance that William Patrick was expressly informed that the marriage on the 7th November 1798 was for the legitimating of the children, and charges William Patrick with having carefully suppressed the letter of the 12th November 1798. At that time it suited the petitioner to treat that letter as genuine, he at that time relying upon the applicability of the Scotch law as to *ante nati* to his case; but now that he finds that the Scotch law is inapplicable, and that that letter, if genuine, would be fatal to the presumption of a prior marriage, his case is, that that letter which he charges William Patrick with suppressing is a mere fabrication, and had no real existence as a genuine document. This is a circumstance not calculated to advance the credit to be given to his evidence.

A very long letter of the petitioner to William Patrick, dated the 14th June 1839, was also read, in which is the passage, "Just to think of your seeking for an American certificate, when you had received my father's own letter, telling you of his marriage with my mother." Throughout the whole of the proceedings there is no intimation of any

other letter from the petitioner's father to William Patrick, mentioning his marriage, than that of the 12th November 1798.

There is other evidence, to which I do not think it necessary to advert, particularly as it has been already mentioned by the Judge Ordinary, tending to show that a letter of the 12th November 1798, from the petitioner's father to William Patrick, had been handed to him in 1823.

Upon the whole, I am abundantly satisfied by the evidence of the existence of the letter of the 12th November 1798, from the petitioner's father, and that it was handed to him.

But the evidence to rebut the presumption of a prior marriage does not stop there. A letter from Ann Vincent, the petitioner's mother, who had married again after the death of William Shedden, has been produced and given in evidence. It is dated New York, 3rd September 1799, and is addressed to Dr. Robert Patrick. In it she says, "My worthy husband made his last will and testament some time before his death, making settlements as far as he could, and appointed executors for fulfilling his intentions. He also, at the same time, wrote your brother William in the most affectionate terms, recommending our son William to his guardianship and protection, and made a remittance on account of this infant, the view being to send William to Scotland for his education."

As far as we can judge, from what she states of that letter of her husband in this letter of hers, it is precisely according to that which is put in as being the genuine letter written by the petitioner's father when he was on his deathbed.

In this letter she treats the marriage and the will as contemporaneous acts. She says, "The fact is, the marriage was solemnly performed, and the will as regularly executed, as any two acts of their nature could possibly require, and ample testimony of the facts I trust I have furnished." That is what she says. She seems to think that the marriage

1860. Nov. 9 to 27.

SHEDDEN v. PATRICK.

removes her son's defect of title on the ground of illegitimacy, appearing to have the same view of the law upon the subject that her husband, William Shedden, had, viz., that a marriage would legitimate the children born before; but she makes no mention of a previous marriage, or any other than a marriage solemnly performed. I may say that, throughout the whole of the proceedings down to the 5th of April 1849, when the supplementary summons was introduced, none of the parties in this case seemed to have any idea of suggesting a previous marriage, but relied wholly upon the applicability of the Scotch law respecting *ante nati* to the case of the petitioner.

In this letter she also states that her husband, when he made his will, wrote a letter to William Patrick in the most affectionate terms, recommending their son William to his guardianship, and making a remittance on his account. This is an additional piece of evidence of the strongest kind to show the existence and genuineness of the letter of the 12th November 1798.

As it is said by the petitioners that the reputation of the marriage of William Shedden and Ann Wilson, at some time previous to the birth of the petitioner, was generally notorious at New York, and he might be presumed to be in communication with his sisters and others who would be acquainted with that repute, it would appear to be somewhat extraordinary that the petitioner, in the proceedings in 1848, gave no intimation of a prior marriage, but rested his case wholly upon the marriage of the 7th November 1798.

In his petition to the House of Lords he states that he first became aware of the civil contract of marriage when in New York in 1849. This, however, is hardly consistent with his letter of the 14th June 1839, in which he says, "that he had heard from his sister in 1829 of the former marriage, and of her father treating Ann Wilson as his wife, and that there was a woman then alive who was present at the marriage."

With this information in 1829, it does seem extraordinary, if the petitioner believed it, that in the summons in 1848 he should state that "it was during this last temporary residence in New York that he formed an intimacy and connection with Miss Ann Wilson, mother of the pursuer William Patrick Ralston Shedden, and of which connexion there were born the pursuer and a daughter.

He then says, "With the special view and avowed purpose of legitimating the pursuer and his sister, the pursuer's said father married the said Ann Wilson, the pursuer's mother, at New York on or about the 7th day of November 1798." No one reading that could understand it to be other than the expression of a man who had no idea of any previous marriage, but that he was relying wholly at that time upon the marriage which was solemnly celebrated in 1798. This proceeding, however, may well be accounted for, if he had, as I believe he had, seen and had in his hands his father's letter of the 12th November 1798, which seems decisive against the presumption of a prior marriage, and he would naturally rely upon the effect of that marriage of the 7th November 1798, upon the question of his legitimacy. It is not until the 5th April 1849, that in a supplementary summons he for the first time relies upon a prior marriage, and says that by the law of America his father and Ann Wilson had been married prior to his birth, inasmuch as they had before and after his birth lived and cohabited together as man and wife, acknowledging each other as such, and were held and reputed as such by their friends, neighbours, and acquaintances—treating these facts, if proved, not as presumptive evidence, liable to be rebutted, of a marriage, but as constituting an actual marriage.

These circumstances, however, do not of themselves constitute a marriage, as the petitioner seems to infer, but are *primâ facie* evidence from which a marriage may be inferred, unless rebutted by other evidence negativing the presumption arising from such *primâ facie* evidence.

1860.
Nov. 9 to 27.

SHEDDEN
v.
PATRICK.

In the present case, whatever weight may be attached to the *primâ facie* evidence for the petitioner, it is, in my opinion, amply rebutted by the evidence relied upon by the respondents, and it appears to me the petitioners have failed in proving that there was a prior marriage to that of 1798, and, consequently, that they have not shown that the first-named petitioner was the legitimate child of his parents, and that being so, he is not a natural-born subject of her Majesty.

MR. JUSTICE WILLIAMS: I am very clearly of the same opinion: and after the very full investigation and discussion by the Judge Ordinary and by my brother Wightman of the evidence which has been adduced on the one side and the other, agreeing altogether as I do in the views they have taken of it, I do not think that I am called upon to go over the same ground again, and I shall content myself with saying that I do not feel one particle of doubt that the letter alleged to have been written by the late William Shedden on his death-bed, on the 12th November 1798, is a genuine letter; and further, that I do not feel one particle of doubt that the letters of the different members of the Patrick and Shedden families, written at the close of the year 1798 and the early part of the year 1799, are genuine letters, and were sincerely and honestly written by the members of these families respectively. It follows, as was conceded by Mr. Collier, with the full concurrence of his clients, and as, indeed, no reasonable person could help conceding, that I must come to the conclusion that no marriage between the petitioner's parents took place until the marriage in November 1798, and that, therefore, the petitioner was not their legitimate son.

Decree, that the elder petitioner is not legitimate, and is not a natural-born subject; and condemn the petitioners in the costs of the petition.

1860.
December 11.
And
1861.
January 30.

(*Before the* JUDGE ORDINARY *and a Common Jury.*)

STOATE *v.* STOATE.

STOATE
v.
STOATE.

Husband and Wife.—Suit for a Separation.—Verdict and Decree.—Such Decree inadmissible as Evidence in a subsequent Suit for Dissolution.

Wife petitioned for judicial separation by reason of cruelty and desertion, and a decree was made in her favour on a verdict finding cruelty and desertion against the husband. The husband subsequently petitioned for dissolution of marriage by reason of the wife's adultery, who answered charging, *inter alia*, cruelty and desertion, as in her original petition. Issue joined, and at the trial the counsel tendered as evidence a certified copy, under seal, of the decree of judicial separation, in proof of the cruelty and desertion; but the Judge Ordinary refused to let it go to the jury, on the ground that it would be indirectly making use of evidence which was directly inadmissible in the present trial.

This was a petition for a dissolution of marriage at the suit of the husband, by reason of the wife's adultery in 1855, and in the months of July, August, and November, 1858, at certain specified places in Bristol. Previously to the commencement of this petition the wife had, on the 16th of February, 1859, obtained a sentence of judicial separation, grounded on the verdict of a jury which had found that the husband had deserted his wife for upwards of two years without cause, and had treated her with cruelty. On the petition for judicial separation, the wife was examined as a witness to prove the desertion and cruelty.

In answer to the petition for dissolution, she denied the adultery, alleged adultery by the husband, desertion since December, 1853, cruelty since marriage, and pleaded the verdict and decree of the Court thereon in her suit for judicial separation, and alleged connivance of her adultery, if any.

The husband took issue on these answers, and the issues

1860. December 11. And 1861. January 30.

STOATE v. STOATE.

were tried before the Judge Ordinary and a common jury, on December 11th, 1860.

The petitioner conducted his own case.

Mr. Serjt. Parry and *Dr. Swabey* for the respondent.

In the course of the case counsel tendered, as evidence to prove the desertion and cruelty alleged in the answer, a certified copy under seal of the decree for judicial separation.

THE JUDGE ORDINARY refused to admit it, on the ground that it would be indirectly making use of evidence which was directly inadmissible in the present suit (14 & 15 Vict. c. 99, s. 4; 22 & 23 Vict. c. 71, s. 6; *R.* v. *Boston*, 4 East, 572).

The jury ultimately found a verdict for the petitioner, who thereupon prayed the Court to make a decree *nisi* for the dissolution of the marriage. *Cur. adv. vult.*

January 30. THE JUDGE ORDINARY: I have considered this case, and am of opinion that the petitioner is entitled to a decree *nisi* for a dissolution; the wife's taxed costs to be paid out of the sum paid by the petitioner into the registry, if sufficient to meet them.

1861.
Jan. 18 and 19.

RYDER v. RYDER.

(*Before the Full Court,*—THE JUDGE ORDINARY, WILLES, J., *and* CHANNELL, B.)

RYDER *v.* RYDER (on appeal from interim order as to Custody of Children).

Custody of Children.—35th Section of Divorce Act.—Age.—Practice on Motion for Interim Order.

On a motion for an interim order for the custody of children, the Court will consider all the existing circumstances at the time of the application, but will not allow affidavits to be read as to the truth or falsehood of charges brought by the parties to the petition against each other.

The Court has, under the 35th section of the Divorce Act, no jurisdiction to make any order as to custody of children upwards of sixteen years of age:

SEMBLE, but if necessary, might make an order as to their maintenance.

This was a question arising out of a petition for dissolution of marriage at the suit of the Honourable Marion Charlotte Emaly Ryder, against the Honourable Frederick Dudley Ryder, to which an answer was filed by him. The petition and answer contained very serious charges against the respective parties.

On the 24th of May, 1860, a motion was made on behalf of the petitioner before the Judge Ordinary, praying that the children of the marriage should be withdrawn from the custody of the respondent, and committed to the care of the petitioner. There were ten children, the eldest a daughter then in her twentieth year, two sons between that age and sixteen, and the other children under the age of fourteen years.

On the 30th May the Judge Ordinary made the following order:—

"The Judge Ordinary having heard counsel on the part of "the petitioner, and also of the respondent, made no order "with respect to the eldest, second, and third child, the

1861. Jan. 18 and 19

RYDER v. RYDER.

"issue of the marriage between the respondent and the petitioner, but ordered that the younger sons, issue of the said marriage, should remain at school, where they now severally are, until further order, and pass their vacation at the house of the Earl of Harrowby, their uncle, or at the house of the Honourable Granville Dudley Ryder, also their uncle, until further order. The Judge Ordinary further directed that during the residence of the said children at the house of their uncles, but not elsewhere, the respondent and petitioner should be allowed access to them, or any of them, once a fortnight, and whenever the respondent or petitioner so visited them, such visit should be made in the presence of some person selected by the uncle in whose house they were."

At the time of making this order, the Judge Ordinary stated that the three elder children were above the age at which the Court interfered in such matters, and that he would make no order as to them. On the original motion no affidavits were read in Court, but, at the request of counsel for both parties, the Judge Ordinary read the affidavits out of Court, and made the above order without alluding to them.

The present appeal was by Mrs. Ryder, from the refusal of the Judge Ordinary to make any order with respect to the three elder children, and prayed for the interference of the Court as to their custody.

Mr. Serjt. Pigott and *Mr. M'Queen,* for Mrs. Ryder, contended that under the 35th section of the Divorce Act the Court had a large discretionary power, which was not fettered by the common-law rule of not interfering with children after the age of fourteen, or rather, as now seems settled, sixteen years (*Reg.* v. *Howes*, 30 L. J. Mag. Cas. 47). That this Court stood under the statute in a similar position to the Court of Chancery when there is ground for its interference, and had a jurisdiction which it was its duty to exercise during

minority, *i. e.* till twenty-one years of age complete. On the learned counsel proceeding to read certain affidavits filed in the case, objection was taken by

1861.
Jan. 18 and 19.

RYDER
v.
RYDER.

Sir F. Slade (*Dr. Twiss* and *Dr. Spinks* with him), for Mr. Ryder, to any affidavits being read which tended to affect the truth or falsehood of the charges alleged in the petition and answer respectively.

And the Court was of opinion not to allow any affidavits to be read to prove the truth or falsehood of such allegations; that it would be most mischievous to prejudice, by discussion on the present motion, points which might hereafter be in issue before a jury; that the duty of the Court was to look at all the actual circumstances of the present application: the age of children, the position in which they find themselves in relation to other members of the family, the fact that a suit is pending between the parents, in which such and such charges are made on both sides, but not to attempt to ascertain the truth or falsehood of the charges.

January 19.

Dr. Twiss (in the absence of *Sir F. Slade*) contended that it was a question affecting the liberty of the subject; that there were no words in the section which would warrant the interference of the Court after the age at which the courts of common law would interfere, whether that were to be taken at fourteen or sixteen years; that the Chancery jurisdiction was founded on totally different considerations, and in respect of those the Court had power, under the 35th section, if it should think fit, to direct proceedings to be taken for placing such children under the protection of the Court of Chancery. The learned counsel was stopped by

WILLES, J., who said that the Court was satisfied that it had no power to make any order with respect to the three

1861. Jan. 18 and 19.

RYDER v. RYDER.

elder children, so that any inquiry into the circumstances in which they were placed was unnecessary. The jurisdiction sought to be exercised is the creation of the Act, and there seems a plain reason why that exercised by the Court of Chancery is no guide, viz. that in that court the persons whose liberty is sought to be controlled are represented before the Court, but that cannot be the case before this Court. Again, suppose this Court were to make an order restraining the liberty of these children who are sixteen years and upwards, how could we enforce obedience to it? A Court is slow to exercise a jurisdiction it cannot enforce. With respect to the children under fourteen years, the persons interested in their control, viz. the parents, are before the Court, and may be heard. The question as to any order in respect of the maintenance of children above sixteen, if necessary, is not affected by our present decision.

CHANNELL, B., concurred.—The common-law courts never assisted parents seeking to obtain the custody of their children, those children resisting, after years of discretion; and for the present case it is immaterial whether that is fourteen or sixteen years, for here there are no children between those ages.

1861. January 22.

DOLBY v. DOLBY AND HEWITT.

(*Before the* JUDGE ORDINARY *and a Common Jury.*)

DOLBY *v.* DOLBY AND HEWITT.

Petition for Dissolution.—Issue between Petitioner and Co-respondent found against the latter.—Unsatisfactory Evidence. —No Decree against Wife.

On the husband's petition for dissolution, the co-respondent put the charge of adultery in issue; but the wife did not answer the petition.

1861.
January 22.

DOLBY
v.
DOLBY AND HEWITT.

On trial of the issue, the jury found a verdict of adultery against the co-respondent; and the Judge Ordinary, not being satisfied that the adultery was proved by the evidence, refused to make a decree against the wife, but permitted the petitioner to amend his evidence if he could.

This was a petition for dissolution of marriage at the suit of the husband by reason of the wife's adultery with one Hewitt. The issue for the jury was between the petitioner and co-respondent only, and was tried in the sittings after Michaelmas Term.

Mr. Ward for the petitioner.

Mr. Biron for the co-respondent.

The respondent had not answered. The evidence in proof of the adultery was of a very unsatisfactory nature, but the jury returned a verdict for the petitioner, and the Judge Ordinary took time to consider his decree.

THE JUDGE ORDINARY: I have considered what course I shall pursue in this case. The only question for the jury was the issue raised between the petitioner and co-respondent, whether the latter had committed adultery. They found a verdict for the petitioner, but it is for me to be satisfied that the case was made out as against the wife, and upon the evidence I then heard, I am not satisfied and therefore cannot make a decree against her. The petitioner is at liberty to amend his case if he can do so.

1861.
January 24 and February 16.

BEVAN (falsely called M'MAHON) v. M'MAHON.

(*Before the Full Court*,—THE JUDGE ORDINARY, WILLES, J., *and* CHANNELL, B.)

MARGARET LEE BEVAN (falsely called M'MAHON) *v.* JAMES M'MAHON.

False Statement in Affidavit to lead Marriage License.—Suit for Nullity not sustained.

B. and C., man and woman, both of full age, intending to marry, B., with the knowledge of C., in his statement to the surrogate, and affidavit in pursuance therewith, omitted one of C.'s names, gave her place of residence falsely, and falsely described his own residence and occupation, with the view, as was alleged, of fraudulently obtaining the license from the surrogate. C. petitioned for a declaration of nullity, but the Court held the marriage to be valid, and confirmed the distinction between banns and licenses which had been adverted to in previous cases.

This was a petition for a declaratory sentence of nullity of marriage, brought by the petitioner against the respondent, who had appeared to the citation, but had filed no answer. The petition was in the following terms:—

"The petition of Margaret Lee Bevan, of Ellesmere, Shropshire, and late of Clayton Lodge, in the County of Lancaster, falsely called M'Mahon,

"Humbly showeth,

"1. That the ceremony of marriage according to the rites of the Church of England was, on the 23rd of July, 1858, performed in the church of St. George, Everton, in the parish of Walton-on-the-Hill, in the county of Lancaster, by the Rev. Anthony Winter Bailey, clerk, the curate of the said church of St. George, Everton, between your petitioner and one James M'Mahon, the above-named respondent, but that the said ceremony of marriage was performed by virtue of a license procured by the respondent, with the knowledge and

1861.

January 24 and February 16.

BEVAN (falsely called M'MAHON) v. M'MAHON.

"assent of your petitioner by fraud in the following respect, "viz. that the respondent tendered to the surrogate, as the "name of the woman to be married, the name Margaret "Bevan, and in answer to the inquiry of the said surrogate "described her as of Whitfield Street, Toxteth Park, and ten- "dered his own address to the said surrogate as Yates Street, "Toxteth, and also described himself to the said surrogate as "a bookkeeper, and also swore to the said surrogate that the "woman to be married had resided for fifteen days then last "past in the parish of Walton-on-the-Hill, and also prayed "the said license for a marriage to be celebrated at the church "of St. George, Everton, in the parish of Walton-on-the-Hill, "and the said license was made out and issued by the said "surrogate, following the exact form in which the name of one "party, and the addresses of both, were tendered, as herein- "before alleged, and did embody the statement concerning the "occupation of the man hereinbefore alleged to have been "made by the respondent, and was made out for a marriage to "take place at the said church of St. George, Everton, in the "parish of Walton-on-the-Hill, and the said ceremony of mar- "riage was celebrated at the said church.

"2. And the said petitioner further shows, that the resi- "dence of the petitioner at the time of the praying for the "said license was not, nor never had been, Whitfield Street, "Toxteth Park, but was, and for a long time had been, Clay- "ton Lodge, Aigburgh, the two last-mentioned places being "utterly distinct, and never confounded in repute, and that "the residence of the respondent at the said time was not "Yates Street, but at Aigburgh aforesaid, and that the said "respondent was not at the said time a bookkeeper, but the "conductor of an omnibus, and that the petitioner had not for "the said fifteen days resided in the said parish of Walton- "on-the-Hill, but in the parish of Childwall, and that each "and all of the facts mentioned in this article of the petition "were at the time of the praying for the said license, and of

1861. January 24 and February 16.

BEVAN (falsely called M'MAHON) v. M'MAHON.

"the agreement in the next Article mentioned, well known to "the petitioner and the respondent.

"3. And the petitioner further shows, that the respondent "prayed for the said license in the form set out above, as to "the particulars spoken to hereinabove, with the knowledge "of the petitioner, and in pursuance of a conspiracy and "agreement previously made between them the said parties, "which agreement was that the respondent should obtain the "said license by fraud, and in particular by fraudulently ten- "dering as the name of the woman to be married a name not "the name of the petitioner, and by tendering as the ad- "dresses of the parties addresses not the addresses of the pe- "titioner and respondent, and by fraud in the respect of the "occupation of the respondent, and in respect of the residence "of the woman during the said fifteen days, and in particular "by the specific frauds in all the particulars herein spoken to, "which are in the first article of this petition alleged to have "been actually committed by the respondent, and that the re- "spondent should pray for the license for a marriage to be "celebrated in the said church of St. George, Everton; and "the petitioner shows that the petitioner and the respondent "agreed that the above things should be done in order to con- "ceal from the said surrogate and your petitioner's parents "and family that the said license was intended to be used for "the marriage of the petitioner, and in order to cause the said "surrogate to believe that the said license was intended to be "used for the marriage of some woman other than the peti- "tioner. And the petitioner further shows, that at the time "of the making of the said agreement, and at the time of the "said praying for the license, the petitioner and the respon- "dent believed that if the name and address of the woman to "be married was tendered in the form in which it is herein- "before alleged to have been tendered, the surrogate would "not know that the said license was intended to be used for "the marriage of the petitioner, and that, if the true name "and true address of the petitioner were tendered, the said

"surrogate might and would know that the said license was "intended to be used for the marriage of the petitioner, and "that the other frauds hereinbefore stated to have been agreed "upon and executed were designed to support the same fraud "touching the names and addresses aforesaid. And the peti- "tioner further shows that the said surrogate, on issuing the "said license, did not know that the same was intended to be "used for the marriage of the petitioner, and that the respon- "dent was well aware that he did not know the same.

"4. And the petitioner further shows, that before the said "ceremony of marriage, the petitioner as well as the respon- "dent was well aware that the said license had been issued in "the form in which it has been hereinbefore alleged to have "been issued, as to each and all the particulars hereinbefore "spoken to, and had been obtained by the respondent tender- "ing the name of the woman to be married and the addresses "of the woman and the man, and by his making oath as to the "residence of the woman during the said fifteen days, and by "his making a statement concerning the occupation of the man "in manner and form in which the same are hereinbefore al- "leged to have been tendered and done, and by his fraud in re- "spect of the said matters, that is to say, by the specific frauds "hereinbefore alleged to have been committed by the respon- "dent; and the petitioner shows that the petitioner at the "same time also knew that the said frauds had been com- "mitted with the intent in the last foregoing articles men- "tioned, and that the said license had been issued by the said "surrogate, not knowing that which he is in the said last fore- "going articles alleged not to have known, concerning the "woman to be married. And this petitioner further shows, "that the petitioner and respondent, well knowing the pre- "mises, used the said license to procure the celebration of the "said ceremony of marriage.

"5. And the petitioner further shows that the said disputed "marriage has never been consummated.

1861.
January 24 and February 16.
BEVAN (falsely called M'MAHON) v. M'MAHON.

"Your petitioner on the premises submits that the said "marriage is null and void, and prays your Lordships to de- "clare the said marriage null and void accordingly.

"And your petitioner will ever pray, etc.

"(Signed) MARGARET LEE BEVAN,
"Falsely called M'MAHON."

The case was argued *ex parte* on behalf of the petitioner on the 24th of January, by *Mr. Collier*, Q.C., and *Mr. W. Brandt*. The petitioner, her mother, and other witnesses on her behalf, were examined, and the facts stated in the petition, so far as necessary to found the arguments and the judgment, were proved.

The counsel for the petitioner argued that a serious variation in the names of parties in publication of banns, and even a slight variation where fraud was shown to have been intended, had been held to vitiate the marriage; that no such difference in this respect between banns and license as, it must be admitted, several *obiter dicta* of learned judges hold out, can be maintained. That a license obtained by fraudulent misrepresentation as to the names, place of residence, and description of the parties, was no license to marry the parties who in fact go through the ceremony; and as both parties in this case were cognizant of the fraudulent misrepresentation, that the petitioner was entitled to a decree of nullity.

THE COURT desired the case to stand over that the Queen's Proctor might instruct counsel to argue the point of law arising on the facts in evidence on their Lordships' notes, in support of the validity of the marriage, after which Mr. Collier would have an opportunity of replying.[1]

[1] 23 & 24 Vict. c. 144, s. 5. In every case of a petition for a *dissolution* of marriage it shall be lawful for the Court, if it shall see fit, to direct all necessary papers in the matter to be sent to her Majesty's Proctor, who shall, under the direction of the Attorney-General, in-

1861.
January 24 and February 16.

BEVAN (falsely called M'MAHON) v. M'MAHON.

Dr. Phillimore, Q.C., in the absence of the Attorney-General, contended that neither by the Ecclesiastical, Common, or Statute Law could such a marriage be declared null. The ecclesiastical law obtaining in this country as to licenses is to be found in the canons of A.D. 1604, 100 to 104, inclusive. Before the nullities created by positive enactment, no case can be shown in which a marriage, deliberately solemnized between two persons capable of contracting, has been set aside by reason of non-compliance with the regulations respecting banns and license: such marriages were irregular, and might subject the parties to ecclesiastical censure, but were never invalid. The first Marriage Act, Lord Hardwicke's, 26 Geo. II. c. 33, first introduced nullities of this description, but the distinction between banns and licenses as to the necessity of using the true names has been adverted to in every judgment on the subject from *Cockburn* v. *Garnault*, 1792 (cited in *Cope* v. *Burt*, 1 Consist. 434), to the present time. The statutes enforce the use of the true names, etc., in banns, which is consistent with their intent, namely publication; but the license is a permission to dispense with the publication of banns on such terms as the law prescribes and the ordinary consents to accept. The present Marriage Act contains no enactment under which this marriage can be held void. As to there being no license to marry Margaret Lee Bevan, *è concessis*, both parties intended the instrument to have that effect, and no one was defrauded of any legal rights.

Mr. Collier and *Mr. Brandt* replied.

The sections of 4 Geo. IV. c. 76, bearing on the questions argued are:—

struct counsel to argue before the Court any question in relation to such matter, and which the Court may deem it necessary or expedient to have duly argued, and her Majesty's Proctor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

1861.
January 24 and February 16.

BEVAN (falsely called M'MAHON) v. M'MAHON.

"2. And be it further enacted, that from and after the 1st day of November, all banns of matrimony shall be published in an audible manner in the parish church or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the Office of Matrimony in the Book of Common Prayer," etc.

"7. Provided always, and it is hereby further enacted, that no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall seven days at the least before the time required for the first publication of such banns respectively, deliver or cause to be delivered to such parson, vicar, minister, or curate a notice in writing dated on the day on which the same shall be so delivered, of their true Christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively."

"14. And be it further enacted, for avoiding all fraud and collusion in obtaining of licenses for marriage, that before any such license be granted, one of the parties shall personally swear before the surrogate or other person having authority to grant the same, that he or she believes that there is no impediment of kindred or alliance or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceedings of the said matrimony according to the terms of the said license; and that one of the said parties hath for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized" [the rest of this section refers to consent in case of minors not being widower or widow].

1861.

January 24 and February 16.

BEVAN (falsely called M'MAHON) v. M'MAHON.

"22. [The only enactment of nullity in the statute.] Provided always, and be it further enacted, that if any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special license as aforesaid, or shall knowingly and wilfully intermarry without the publication of banns or license from a person or persons having authority to grant the same first had was obtained, or shall knowingly or wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.

"23. And be it further enacted, that if any valid marriage solemnized by license shall, after the 1st day of November next, be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or a widow, contrary to the provisions of this Act, by means of such party falsely swearing as to any matter or matters to which such party is hereinbefore required personally to swear, such party willfully and knowingly so swearing shall forfeit all estate and interest, if any, accruing by force of the said marriage."

"26. Provided always, and be it further enacted, that after a solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or where the marriage is by license it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry when the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage."

The following cases were cited and commented upon:—

1861.
January 24 and February 16.

BEVAN (falsely called M'MAHON) v. M'MAHON.

Reg. v. *Birmingham*, 8 B. & C. 34; *Reg.* v. *Tibshelf*, 1 B. & C. 290; *Wyatt* v. *Henry*, 2 Consist. 215; *Orme* v. *Holloway*, 5 N.C. 267; *Agar* v. *Holdsworth*, 2 Sir George Lee, 464; *Ewing* v. *Wheatley*, 2 Consist. 175; *Cope* v. *Burt*, 1 Consist. 434; *Frankland* v. *Nicholson*, 3 Maw. & S. 259, in note to the case of *Reg.* v. *Bellinghurst*; *Dormer* v. *Williams*, 1 Curt. 870; *Clowes* v. *Clowes*, 2 N.C. 1; *Tongue* v. *Allen*, 1 Curt. 38; S. C. on appeal, 1 Moore, 90; *Catterall* v. *Sweetman*, 1 Robert, 304; *Swift* v. *Kelly*, 3 Knapp, 282; *The Prince of Capua's Case*, 'Times' newspaper of 5th and 6th of May, 1836, in which Dr. Nicholl, Master of the Faculties, after hearing counsel on both sides, refused a marriage license to the brother of the then King of the Two Sicilies, a caveat having been entered against such license being granted by Count de Ludolf on behalf of his Sicilian Majesty.

THE JUDGE ORDINARY delivered the judgment of the Court. The Court desired the question to be argued on both sides, not because we entertained any serious doubt upon it, but because of its very grave nature, and of its importance to one at least of the parties interested. Having now had the benefit of a very able argument on both sides, we are satisfied that our first view was correct, and that we are bound to hold the marriage good. In this particular instance our decision may inflict a good deal of sorrow and misery upon the petitioner; but a decision the other way might have been still more disastrous to a person in her position if the point had been raised in another manner; for a man after marriage under these circumstances, followed by cohabitation and the birth of children, might have called upon the Court to annul that marriage, to reduce the woman at a late period of life to the position of a mistress, and to bastardize the children. If, therefore, we are to be governed by considerations of public policy, we should be inclined to uphold the marriage; but the question must be decided upon the terms of the statute of Geo. IV. In that

statute a great distinction is made between banns and licenses. The 7th section directs, with respect to banns, that notice is to be given to the minister, at a certain time before the publication, of the true Christian names and surnames, and of the places of residence, etc., of the parties; and by another clause marriages without "due publication," which has been held to include publication of the true Christian names and surnames, were to be null and void. Something more was required beyond the mere names, namely, the places of abode and the length of time in which the parties had dwelt in the parish; but a subsequent section enacted that misdescription in these matters should not be a ground of nullity. Then the 10th section, as to licenses, provides that no licenses are to be granted except in certain cases, and the only section relating to nullity, the 22nd, says: "If any persons shall knowingly "and wilfully intermarry without due publication of banns or "license from a person or persons having authority to grant "the same first had and obtained, the marriage of such persons "shall be null and void to all intents and purposes." In *Dormer* v. *Williams*, 1 Curt. 70, one question was, whether the license was granted by a person having authority to grant the same. No question of that sort arises in this case. The marriage was solemnized at a place within the jurisdiction of the person who granted the license, and who had authority to grant it. He had an affidavit before him containing statements as to matters in respect to which he was authorized by statute to require a statement. Is the marriage to be vitiated by reason of misstatement in that affidavit? We find no authority for that proposition, but, on the contrary, many *dicta*, in a long series of cases, directly the other way, and pointing out the difference in that respect between banns and licenses.

It comes at last to the question, as Mr. Brandt had put it with great force, whether or not this was a license for the marriage of these parties? From the time of Lord Stowell downwards, there have been cases in which a partial departure

1861. January 24 and February 16.

BEVAN (falsely called M'MAHON) v. M'MAHON.

from the true name even in the publication of banns has been held, in the absence of fraud, not to annul the marriage. These decisions show that the name so altered represented the person. Did not the name Margaret Bevan in this case represent the lady? Was not the license granted for her? Did she not authorize M'Mahon to get it for her under that description? Had she not contracted with him to marry him? The license was granted by a person who had authority to grant it, although one of the lady's names was suppressed in order that the surrogate might not suspect who she was; yet there being no pretence for saying that it was obtained for any other person and transferred to her, and there being authority for saying that such an altered name might represent her, she having authorized M'Mahon to obtain the license, and he having accordingly obtained it, the Court cannot say that the marriage solemnized under it is null.

The other learned Judges concurred.

The prayer for a declaration of nullity was accordingly rejected.

1861. January 26 and March 2.

W— v. H— (falsely called W—).

(*Before the* JUDGE ORDINARY.)

W— v. H— (falsely called W—).

Petition for nullity by reason of malformation.—Report of inspectors.—Evidence.

On a petition for a decree of nullity by reason of malformation of the woman, neither the Court nor the parties are concluded by the terms of the report of medical inspectors, but the inspectors themselves and other medical men may be examined. There is no rule as to any particular age constituting a bar to such petitions. Where the result of the medical evidence is that the malformation might possibly, but at great risk to life, and with doubtful success as to the end de-

sired, be removed, the petitioner need not call upon the respondent to submit to an operation, and such a state of things is equivalent to a permanent and irremovable malformation.

1861. January 26 and March 2.

W— v. H— (falsely called W—).

This was a petition for a decree of nullity of marriage, at the suit of the man. The petition stated a marriage in fact in June, 1859, and that the marriage had never been consummated by reason of the malformation of the parts of generation of the woman, which would be apparent on inspection by medical men, and that such malformation was incurable by art or skill. The answer, as originally filed, denied the latter allegations of the petition, charged cruelty against W—, and prayed the Court to reject the prayer of the petition, and to decree a judicial separation on the ground of cruelty. That part of the answer and prayer which alleged cruelty and prayed for a separation were directed to be struck out by order of the Court, on the motion of counsel for the petitioner, which was opposed by counsel for the respondent. (See *Anonymous* case, Deane & Swab. 295.)

The report of Dr. Brodie, Dr. Sewell, and Mr. James Paget, the inspectors appointed, was as follows:—"We have this day "examined together the parts of generation of Margaret "H— (falsely called W—). We find the external parts of "generation well formed, and the hymen perfect, as in a "virgin, and are of opinion that sexual intercourse with her "has never been consummated. The hymen is thick, tough, "extremely sensitive, and has an aperture of not more than "an eighth of an inch in diameter. These conditions of the "hymen constitute an impediment on her part to prevent the "consummation of the marriage, but we find no reason to "believe that these conditions are incurable by surgical opera-"tion."

On the 27th of January the petition came on for hearing before the Judge Ordinary, on the above report and oral evidence. January 27.

1861.
January 26 and March 2.

W—
v.
H—
(falsely called W—).

Mr. M. Chambers, Q.C., and *Dr. Spinks* for the petitioner.

Dr. Phillimore and *Dr. Wambey* for the respondent.

Mr. M. Chambers stated the case for the petitioner, and proposed to call Dr. B. Sewell to explain the conclusion of the inspectors' report.

Dr. Phillimore, contrà: The petitioner is not entitled to contradict or vary the terms of the report by calling other evidence. He has alleged in the petition that the malformation is incurable, but the adverse evidence of the inspectors is conclusive against him on this point. The degree of danger that might arise from the process of cure, and the skill required, have never been considered in the Ecclesiastical Courts. *Brown* v. *Brown*, 1 Hagg. 523, was decided on the ground that the husband had failed to prove that the disease was incurable. Further, it does not appear that the wife has been asked to submit to an operation.

Mr. M. Chambers: In the case first cited witnesses on both sides were examined, and in *D—l* v. *A—g*, 1 Rob. 279, where it is stated, page 299, that if there is a reasonable probability of the woman being made capable, the marriage could not be pronounced void, the Court rescinded the conclusion of the cause in order that Dr. Cape might be re-examined with respect to the discrepancy between the report of and the evidence of himself and the other medical inspectors.

THE JUDGE ORDINARY was of opinion that he ought to hear the evidence, but thought that both inspectors should be examined if one was.

The inspectors and Messrs. Critchett, Solly, and Ericssor were examined.

1861.
January 26 and March 2.

W—
v.
H—
(falsely called W—).

The result of the evidence so taken is sufficiently stated in the judgment.

Dr. Phillimore: The age of the parties is sufficient to disentitle the petitioner to a decree (*Briggs* v. *Morgan*, 2 Consist. 324). There is no precedent for such a decree where the defect is not incurable. The woman has an interest in the question as well as the man, and *non constat* but that she might submit to an operation.

Mr. M. Chambers in support of the petition.

Cur. adv. vult.

March 6.

THE JUDGE ORDINARY gave the following judgment:— This was a petition for decree of nullity of marriage, on the ground of malformation of the respondent. The petition alleged it to be such as rendered the consummation of the marriage impossible, and that it was incurable by art or skill, as would appear on inspection. The answer denied the allegations of the petition, and averred that the marriage had been consummated, and that she was apt, etc., as would appear on inspection. The marriage was solemnized on 3rd June, 1859; the parties cohabited for seven weeks and then separated; they were of the respective ages of fifty-four and forty-nine. Inspectors were appointed, who on the 19th of June, 1860, made their report in the following terms. [The learned Judge here read the report.] The cause came on for hearing on Saturday, January 26th, when Dr. Phillimore, on behalf of the respondent, contended that the Court was bound by the report of the inspectors, and that, as they did not say the impediment was irremovable, but the contrary, the petition must be dismissed, it being an essential ingredient in the petitioner's case that the defect is incurable (*Brown* v. *Brown*, 1 Hagg. 524). On the other hand, it was contended by Mr. Chambers, that, according to the case of *D*— v. *A*—,

1861. January 26 and March 2.

W— v. H— (falsely called W—).

1 Rob. 279, evidence beyond the report and explanatory of it was admissible, and I am of that opinion. The petitioner then called one of the inspectors, and several eminent surgeons, the result of whose evidence was that the obstruction was congenital, and that it might possibly be removed by a surgical operation; that such an operation would in this case, the woman being forty-nine years of age, be attended with considerable danger to her life, and the success of it, with regard to the result to be obtained, doubtful. This evidence having been given for the petitioner, Dr. Phillimore declined calling any witnesses for the respondent, but contended there was no authority for making a decree of nullity on the ground of malformation, the marriage having been contracted between parties of the advanced ages of fifty-four and forty-nine; and he cited the *dictum* of Sir J. Nicholl in *Brown* v. *Brown*, that a man of sixty who marries a woman of fifty-two should be contented to take her *tanquam soror*, 1 Hagg. 524; and the assertion of Lord Stowell in *Briggs* v. *Morgan*, 2 Consist. 328, that the Court in different cases had declined to proceed in suits where the parties are at an advanced period of life, and for that reason he considered the libel open to objection, because the age of the parties was not stated. It appeared afterwards that the woman was fifty, the man who complained forty-two; but the decision did not in either of those cases turn upon the age of the parties, but on the merits; nor can I find any case in which it did. In the case of *D*— v. *A*—, 1 Rob. 298, Dr. Lushington said:—"I apprehend we are "all agreed that, in order to constitute the marriage-bond "between young persons, there must be the power present "or to come of sexual intercourse;" but he says nothing of any limit to the age at which the right to complain ceases; and in both *Brown* v. *Brown* and *Briggs* v. *Morgan* the complaint was heard and inquired into: I think I must take the same course here. The question, then, is simply this: the evidence shows a congenital malformation of the woman, which

1861.
January 26 and March 2.

W—
v.
H—
(falsely called W—).

renders consummation impracticable; that it is not absolutely irremovable, but that any attempt to remove it would be attended with considerable danger to the life of the woman. What course is to be taken? The report of the medical inspectors was made known to her advisers; she has not expressed any desire to undergo an operation, and the Court can hardly assume, under the circumstances of this case, the existence of any such desire. It was said that the petitioner ought to have called upon her to do so; no precedent for such a proceeding has been suggested, aud I am not disposed make one. The petitioner may with great propriety decline proposing that the respondent's life should be placed in danger; she must judge for herself; and there having been no prayer for delay on her part, I think it my duty to proceed with the case on the assumption that things will remain as they are. In the case of *D*— v. *A*—, 1 Rob., one of the inspectors, Dr. Cape, being cross-examined, stated:—"I will "not swear that the vagina is impossible to be further elon- "gated, but I do swear that it could not be effected without "endangering life, or running a serious risk of doing so." No suggestion was there made that the woman should be called upon to submit to such operation, and the Court proceeded to pronounce sentence. That course I think it incumbent on me to take now. The case is therefore a simple one of malformation congenital and permanent, and the petitioner is entitled to the relief that he prays.

1861.
Feb. 13 and 27.

WINSTONE v. WINSTONE AND DYNE.

(*Before the* JUDGE ORDINARY, *on Motion.*)

WINSTONE *v.* WINSTONE AND DYNE.

Petition for Dissolution of Marriage.—Petition for Permanent Alimony after Decree Nisi *for Dissolution.—Practice.*

After a decree *nisi* for dissolution of marriage at the petition of the husband, the wife filed a petition for permanent alimony, or for some payment in lieu thereof, setting forth, as usual, the amount and sources of the husband's income. On motion on behalf of the husband, the Court directed the petition for alimony to be struck off the file of the Court, and refused to allow the costs to be taxed against the husband.

This was a question as to the right of the wife to file a petition for permanent alimony, under the following circumstances:—In April, 1859, Mrs. Winstone petitioned for a decree of judicial separation from her husband, by reason of his cruelty towards her, in consequence of which, as she alleged, she had been compelled to live apart from him since 1847. Mr. Winstone in his answer denied the cruelty, and alleged that between 1847 and 1851 Mrs. Winstone had committed adultery with John G. Dyne, and prayed for a decree of judicial separation on that ground. In August, 1859, Mrs. Winstone having filed a petition for alimony *pendente lite*, the Judge Ordinary made a decree for alimony *pendente lite*, at the rate of £65 per annum. The issues in the suit for judicial separation were tried before the Judge Ordinary and a common jury in February, 1860, when a verdict on both points was given in favour of Mr. Winstone. In June, 1859, Mr. Winstone had filed his petition in the present suit for a decree of dissolution, by reason of his wife's adultery with the said Mr. Dyne. During the pendency of this suit the alimony *pendente lite* was duly paid. Similar issues to to those in the previous suit were raised, and were tried before the Judge Ordinary and a special jury on the 13th and 14th

1861.
Feb. 13 and 27.

WINSTONE v. WINSTONE AND DYNE.

of December, 1860, who a returned a verdict in favour of Mr. Winstone, and the Judge Ordinary thereupon made a decree *nisi* for dissolution of the marriage. On the 28th of January, 1861, Mrs. Winstone filed a petition for alimony, alleging the sources and amount of Mr. Winstone's income, and praying the Court to decree that Mr. Winstone should secure to her such gross sum of money, or such annual sum of money for her life, by way of permanent alimony, as to the Court should seem meet.

Dr. Spinks, for Mr. Winstone, now moved the Court to direct this petition for permanent alimony to be taken off the file and dismissed with costs. The power to apply at all for permanent alimony depends on the 20 & 21 Vict. c. 85, s. 32:—"The Court may, if it shall think fit, on any such "decree (*i. e.* for dissolution of marriage), order that the hus- "band shall, to the satisfaction of the Court, secure to the "wife such gross sum of money, or such annual sum of "money for any term not exceeding her own life, as, having "regard to her fortune, if any, to the ability of the husband, "and the conduct of the parties, it shall deem reasonable; "and for that purpose may refer it to any one of the convey- "ancing counsel of the Court of Chancery to settle and ap- "prove of a proper deed or instrument to be executed by all "necessary parties; and the said Court may in such case, if "it shall see fit, suspend the pronouncing of its decree until "such deed shall have been duly executed."

In the present case the application is too late. Notice of such intended application should be given in the answer to the original petition; otherwise, the husband might content himself with proving enough to obtain a decree without going into the whole of his wife's misconduct, which he would be entitled to do under the words of the section in respect of such an application as this; or at all events the application should be made when the decree *nisi* (23 & 24 Vict. c. 144,

1861. Feb. 13 and 27.

WINSTONE v. WINSTONE AND DYNE.

s. 7) is about to be pronounced, and if necessary, that should be suspended till the Court has the necessary information; for, as between the parties, it is submitted that the decree *nisi* is in reality absolute: they could not be heard against its being made absolute; that privilege is given to third parties on behalf of public interests. Again, if made absolute, must it not be so in the very words of the decree *nisi?* But the order for permanent alimony must form part of the decree, and in this case it forms no part of the decree *nisi*.

Mr. Holl, in support of the petition, contended that the wife was at liberty to bring the present question before the Court at any time before the absolute decree was made.

Cur. adv. vult.

February 27. THE JUDGE ORDINARY, after referring to the above-stated circumstances, said:—This is a very novel attempt with respect to permanent alimony. The wife now brings in a petition in the usual form, stating the sources and amount of the husband's income; to which, if she is to be allowed to proceed, he must give in his sworn answer; on his behalf the motion has been made to take this off the file. Anything in the nature of permanent alimony in a case of dissolution of marriage is the creature of the 32nd section of the Divorce Act; the 29th rule refers only to permanent alimony on a decree of judicial separation. I cannot think that the 32nd section intended, that after a decree *nisi* of dissolution obtained against the wife, she should be at liberty to file her petition for alimony. The petition must be taken off the file; and this part of the costs cannot be taxed against the husband.

1861.
February 20.

ANONYMOUS.

(*Before the* JUDGE ORDINARY, *on Motion.*)

ANONYMOUS.

23 & 24 Vict. c. 144, s. 7.—Intervention of Queen's Proctor. —Practice.

The Queen's Proctor, under direction of the Attorney-General, may move the Court by counsel, without affidavit, for leave to intervene in a divorce suit. But if he moves to have the hearing of the petition postponed that he may have time to plead, that part of the motion must be founded on affidavit, and notice given to the other parties.

Dr. Spinks moved for leave for the Queen's Proctor, under the direction of her Majesty's Attorney-General, to intervene in a petition for dissolution of marriage, which he need not at present mention by name, but which would in ordinary course come on for hearing before long; and for an order to postpone the hearing of the petition, that the Queen's Proctor might plead. 23 & 24 Vict. c. 144, s. 7:—"And at any time during "the progress of a cause, or before the decree is made abso- "lute, any person may give information to her Majesty's Proc- "tor, of any matter material to the due decision of the case, "who may thereupon take such steps as the Atorney-General "may deem necessary or expedient; and if, from any such in- "formation or otherwise, the said Proctor shall suspect that "any parties to the suit are or have been acting in collusion "for the purpose of obtaining a divorce contrary to the justice "of the case, he may, under the direction of the Attorney- "General, and by leave of the Court, intervene in the suit, "alleging such case of collusion, and retain counsel, and sub- "pœna witnesses to prove it," etc. Rule 16 of 'Further Rules and Regulations:'—"When the Queen's Proctor, by leave of "the Court, intervenes, he shall, within eight days after such "leave obtained, enter an appearance and plead to the petition; "and all subsequent pleadings shall proceed between the peti- "tioner and the intervener, according to the rules established

1861. February 20. ANONYMOUS.

"with regard to pleadings between the original parties to the "cause."

THE JUDGE ORDINARY: Have you any affidavits?

Dr. Spinks: No; I submit that the directions of the Attorney-General are sufficient. There is nothing in the section or the rules to require an affidavit.

THE JUDGE ORDINARY: As to the leave to intervene, I think you are right. I may very well take from counsel that the Attorney-General has so directed the Queen's Proctor; but as to that part of the motion which asks for postponement, as that is an interference with the ordinary right of the petitioner to have the cause heard in its turn, I think I must have an affidavit stating the time at which the information on which the Queen's Proctor is acting was furnished him; and notice should be given to the other parties. This may be done in the course of the afternoon, and you may renew the motion to-morrow morning.

February 23. GOODHEIM v. GOODHEIM AND FRANKINSON.

(*Before the* JUDGE ORDINARY, *on Motion.*)

GOODHEIM *v.* GOODHEIM AND FRANKINSON.

Petition for Alimony pendente lite.—*Wife in actual possession of Income.*

Not only the wife's income derived from separate property will be taken into account in allotting alimony *pendente lite*, but income of which she is in the actual enjoyment, though earned by herself.

This was a question arising on the answer to a petition for alimony *pendente lite*. The petition alleged the husband's

income to be £500 per annum; from the husband's answer it appeared that he was a cap-manufacturer at Manchester, and that his net annual income was about £100. The answer further stated that the wife before marriage earned 12*s.* a week by making caps, that the husband derived no pecuniary advantage from his marriage, that the wife left him in November, 1846, taking furniture and linen to the value of about £80, and that the husband had not since that time had any communication with her, and ended with the following statement:—"That the said Hannah Goodheim, as I have been informed since the filing of this petition for divorce and verily believe, is now and has for many months been residing at and occupying a house at Wolverhampton; that from the use of the said house, and from the use and letting of the apartments therein, she has for many months derived and still continues to derive large gains, profits, and sums of money, amply sufficient to maintain and support her with all necessaries and comforts suitable to her former position as my wife; that the said house is well furnished, and the said Hannah Goodheim always appears well dressed and as if she were in easy circumstances."

Dr. Spinks moved the Court to decree alimony *pendente lite*.

Mr. Francis Russell, for the husband, *contrà*: The husband's answer, which is uncontradicted, shows that the woman is actually in receipt of a sufficient income. Under somewhat similar circumstances of separation the wife has been held entitled to dispose of property (*Haddon* v. *Fladgate*, 1 Swab. and Trist. 48); but, however that may be, separate property, for the purpose of such inquiries as the present, cannot be taken in the same strict sense as it would be in the Court of Chancery. The class of cases that came before the Ecclesiastical Courts were for the most part from so different a rank of

1861. February 27.

GOODHEIM v. GOODHEIM AND FRANKINSON.

life from such a case as this, that they hardly afford a safe guide.

Dr. Spinks in reply: The part of the answer now relied on for the husband is wholly irrelevant. There is no averment of property possessed by the wife, and independently of her industry the wife has a right to be supported by the husband.

BY THE COURT: That the wife *might* earn an income would not be sufficient to relieve the husband; but here it is said that she does earn. Can I with justice shut my eyes to the fact that she is in receipt of an income? *Cur. adv. vult.*

February 27. THE JUDGE ORDINARY: This was an application for alimony *pendente lite*. To the petition the husband filed an answer, stating that the wife was in possession of a house and a sufficient income. There was no reply to that; but it was suggested that no such ground as that would have availed in the Ecclesiastical Courts, there being no statement that the wife was in possession of separate property. But if actually in possession of an income—take the case of husband and wife living separately and supporting themselves by tuition—I think I must take it into account, and as in the present case the wife does not deny that she is actually in possession of an income, I shall make no decree for alimony *pendente lite*.

(*Before the* JUDGE ORDINARY.)

GOODE *v.* GOODE AND HAMSON.

Petition for Dissolution by Husband.—Adultery pleaded.—Condonation replied.—Discretion of the Court.

The adultery or cruelty of the petitioner, though condoned, enable the Court to exercise the discretionary power given to it by the 31st section of the Divorce Act, and to dismiss the petition if it think fit, though the adultery of the respondent is proved.

This was a petition for dissolution of marriage, brought by the husband on the ground of the wife's adultery. The answer, among other things, alleged the adultery of the petitioner, which he, in reply, alleged to have been condoned. On proof of these facts a question arose, whether or no the discretionary power of the Court, under the 31st section of the Divorce Act, to refuse a decree if the petitioner has been guilty of adultery, is barred by the condonation of such adultery.

Mr. Mundell and *Mr. Markham* for the petitioner.

Dr. Spinks for the respondent.[1] The particulars of the case are fully set out in the judgment. *Cur. adv. vult.*

THE JUDGE ORDINARY gave judgment: This was a petition for a dissolution of marriage on the ground of adultery committed by the respondent with the co-respondent. The answer denied adultery, alleged desertion by the petitioner, indecent assault upon a young female committed by petitioner, threat to injure respondent with an open knife, condonation of

[1] The fourth paragraph of the answer alleged, that in or about the month of June, 1845, the said Edward Goode left his house at Brixworth, in the county of Northampton, where the said respondent was then living with him, without any reasonable cause, and deserted the said Esther Goode, etc. The replication simply took issue on this. At

1861.
March 1, 2, and 20.

GOODE v. GOODE AND HAMSON.

adultery. The co-respondent did not appear. The replication traversed the allegations of the answer, and averred condonation of the adultery committed by the petitioner. The parties resided in the village of Brixworth, in the county of Northampton; and the evidence proved the state of morality there to be exceedingly bad. Every female witness called from that neighbourhood admitted that she had borne at least one illegitimate child, and it is necessary to examine the evidence on both sides with considerable jealousy and suspicion. Nevertheless, the main facts of the case upon which the judgment of the Court must be founded were established with reasonable certainty. The parties were married on the 28th of December, 1843, and had a child born to them within six months afterwards. They were then living in the house of the respondent's parents, but soon afterwards, upon some quarrel between them, the nature of which was not proved, the petitioner left that house and went to his father's. Soon afterwards he went to London, having made an offer to take respondent with him, but she refused to go. The petitioner, by the advice of an attorney's clerk, took two persons with him to be witnesses of this offer. It is plain that he did not expect her to accept it, and I have great doubts as to his wishing that she should. In London he formed a connection with a young woman named Mary Ann Barker, and by her had an illegitimate child born in 1846. In 1848 the respondent went to London and returned with her husband to Brix-

the hearing, evidence was offered on behalf of the petitioner, that he had reasonable cause for leaving the respondent.

Dr. Spinks objected to this evidence, contending that the replication, if such evidence was intended to be used, should have averred reasonable cause, instead of simply taking issue apparently on the fact of desertion.

THE JUDGE ORDINARY: In a court of common law it would be the correct mode of pleading, as in the case of actions for dismissing servants without cause; but in this Court, if the evidence satisfied me that there was reasonable cause, I should be bound to act on it.

worth and cohabited with him there. No evidence is given as to the circumstances under which the reconciliation between them took place. The precise time of her becoming aware of the petitioner's connection with Mary Anne Barker did not appear, but there was no doubt that she continued to cohabit with him after she knew it, and so condoned his offence. No evidence was given as to their mode of treating each other for a considerable period after their return to Brixworth; but it was proved that in 1857 she frequently associated with Richard Hamson, the co-respondent, and that this, amongst other things, gave rise to frequent quarrels between them, and sometimes to acts of violence on the part of the petitioner. In 1858 there was a very serious disturbance between them; the respondent called in a policeman for her protection, and he took away a pistol from the petitioner. At the same time the respondent charged her husband with having made an indecent assault upon a girl of fourteen years of age who was staying with them in the house. This was denied by the petitioner, and it is unnecessary to pursue the subject further, for I am not satisfied that the truth of the charge was established. The respondent soon after quitted her husband, contrary to his wish, and went to live at Northampton, and I am convinced by the evidence that she there committed adultery with Hamson, the co-respondent. This state of facts raises two important questions: first, whether I am at liberty to take into consideration the adultery committed by the husband, the wife having condoned it; secondly, whether, if it be taken into consideration, I ought, in the exercise of the discretion vested in the Court, to refuse to grant the prayer of the petition. Questions relating to petitions for dissolution of marriage are, for the most part, settled by the statute 20 & 21 Vict. c. 85. But it may be useful to inquire into the state of the law as administered by the Ecclesiastical Court in proceedings for divorce *à mensâ et thoro*. The only causes for which such a sentence was pronounced by that Court were

1861. March 1, 2, and 20. — GOODE v. GOODE AND HAMSON.

adultery and cruelty; and condonation by the party suing was a bar to the suit. So also a similar offence committed by the party suing might be pleaded in bar of the suit; this was sometimes called *compensatio*, sometimes *recriminatio*. Then arose the question, whether condonation by the party sued was an answer to such plea. In *Beeby* v. *Beeby*, 1 Hagg. 789, Lord Stowell intimated that in his opinion it would not be so; that a party suing for his wife's adultery, having been himself guilty of a similar offence, would not by condonation become *rectus in curiâ*, so as to be entitled to a decree. *Anichini* v. *Anichini*, 2 Curt. 210, is the only case that I am aware of where that doctrine has been controverted. There the wife sued for restitution; the husband pleaded her adultery in bar; she recriminated; and to her replication he rejoined condonation. The very eminent Judge who decided that case dissented from the opinion expressed by Lord Stowell, and held that a party might, under such circumstances, become *rectus in curiâ*, but did not, as I understand his judgment, hold that such a consequence would necessarily and as a matter of law result from condonation. At p. 218, after commenting on Lord Stowell's language in *Beeby* v. *Beeby*, he says: "It is "difficult and dangerous to attempt to lay down any general "rule; but I cannot go the length of saying that the adultery "of the husband, followed by condonation, would debar him "from a remedy against his wife under any circumstances "which I can suppose." I apprehend therefore that the learned Judge did not mean to decide that condonation was a complete legal answer to the plea imputing adultery to the husband, but that, in such cases, the question is one to be dealt with by the judge according to his discretion, taking into consideration the peculiar circumstances of each case. Let us now see what provisions the Legislature has made for regulating the rights of suitors in this Court. Sect. 29 enacts, etc.,—"And shall inquire into any counter-charge which may "be made against the petitioner." The 30th section is in

these terms :—"In case the Court, on the evidence in relation "to any such petition, shall not be satisfied that the alleged "adultery has been committed, or shall find that the peti- "tioner has, during the marriage, been accessory to or conni- "ving at the adultery of the other party to the marriage, or "has condoned the adultery complained of, or that the peti- "tion is presented or prosecuted in collusion with either of "the respondents, then and in any of the said cases the Court "shall dismiss the said petition." This leaves nothing to the discretion of the Court. If there has been connivance or condonation or collusion on the part of the petitioner, "the Court "shall dismiss the petition." The first branch of the 31st section is the converse of this :—"In case the Court shall be "satisfied on the evidence that the case of the petitioner has "been proved, and shall not find that the petitioner has been "in any manner accessory to or conniving at the adultery of "the other party to the marriage, or has condoned the adul- "tery complained of, or that the petition is presented or pro- "secuted in collusion with either of the respondents, then the "Court shall pronounce a decree declaring such marriage to "be dissolved." This, however, is subject to the important proviso that follows :—"That the Court shall not be bound to "pronounce such decree if it shall find that the petitioner has "during the marriage been guilty of adultery" (nothing is here said of condonation) "or if the petitioner shall in the "opinion of the Court have been guilty of unreasonable delay "in presenting or prosecuting such petition, or of cruelty to- "wards the other party of the marriage, or of having deserted "or wilfully separated himself or herself from the other party "before the adultery complained of and without reasonable "excuse, or of such wilful neglect or misconduct as has con- "duced to the adultery." To some of the instances of misconduct here enumerated the doctrine of condonation is inapplicable, and they may certainly be taken into consideration, with whatever degree of patience or resignation they may have

1861. March 1, 2, and 20.

GOODE v. GOODE AND HAMSON.

been endured, and those to which it is applicable may, although condoned, have conduced to the adultery. The Legislature does not introduce the absence of condonation as a necessary ingredient in the matters to be dealt with by the Court according to its discretion, as in the first branch of the section. Where it was intended to make condonation a legal bar, the Legislature has said so, as in section 30. If in this clause it had been intended to prohibit the Court from taking into consideration offences which had been previously condoned, no doubt words to that effect would have been introduced. It seems plain to me that the Legislature confided to the judicial discretion of the Court all such matters as are described in the proviso, and with reference to them it seems to place the Court in the same position when dealing with the petitions for dissolution of marriage as the Ecclesiastical Court was in with regard to suits for divorce *à mensâ et thoro*. According to what I understand to have been the decision in *Anichini* v. *Anichini*, a counter-charge against a petitioner is not then as a matter of law barred by condonation, but with all the other circumstances of the case it is to be taken into consideration. It remains to be considered whether, under the circumstances of this case, I ought to decree a dissolution of the marriage. By the intercourse which the petitioner had with his wife before marriage, he must have taught her to think lightly of the value of chastity. After marriage, for some reason unexplained, he went to reside in London, and there formed an adulterous connection with the female named Barker, the duration of which was left uncertain; but from the evidence of a female witness who saw them together frequently in London, I assume that it existed for a considerable time. The circumstances under which he and his wife became reconciled were also left unexplained; nor was any account given of their married life for some time afterwards. Then we find them constantly quarrelling, and the petitioner not seldom guilty of acts of violence towards her. It was said that these acts were

in consequence of quarrels about Hamson—and there was some evidence to justify the assertion—but taking into consideration the former delinquency of the husband, in combination with all the circumstances that were proved respecting his subsequent mode of living with the respondent, I cannot think that he is one of the persons for whose benefit this Court was constituted: and in the exercise of the discretion vested in me by the 31st section, I dismiss this petition.

Manning v. M. 2 P.D. 226

(*Before the* JUDGE ORDINARY.)

BRODIE *v.* BRODIE.

Petition for Dissolution.—Domicil.—Jurisdiction.—Practice.

Where a case has been in part heard before the Judge Ordinary and is adjourned for further proof and argument before the full Court, the facts proved before the Judge Ordinary must be proved again before the full Court.

Evidence of declarations made by the petitioner, accompanying acts done by him, is admissible to prove his intention of abandoning or acquiring a certain domicil. A *bonâ fide* residence of the husband in this country, not casual, or as a traveller, is sufficient to found the jurisdiction of this Court against the wife, who has committed adultery in Australia during such residence. Whether such facts would constitute the acquisition of a new domicil for testamentary purposes is another question.

Dr. Phillimore, Q.C., and *Mr. W. Murray* were counsel for the petitioner.

The facts of this case raised an important question as to the jurisdiction of the Court. The petitioner, George Sinclair Brodie, was a Scotchman by birth. He married the respondent, formerly Mary Payne Wood, an Englishwoman by birth, in Tasmania, in January, 1833. They lived together, first in

1861.
March 1 and April 22.
BRODIE v. BRODIE.

Tasmania and afterwards in Melbourne, until September, 1850, and had nine children. A separation by mutual consent then took place in consequence of a quarrel, and a deed was entered into under which the petitioner made her an allowance of £156 a year. This allowance was afterwards increased to £250 a year. He left Melbourne with his five daughters in February, 1851, and arrived in London in June, 1851. He then went to Scotland and stayed there until June, 1852, when he returned to Melbourne. In June, 1853, he returned to Scotland, and stayed there until May, 1854. He then sold his house in Scotland and took up his residence in England. He continued in England until 1858. At the beginning of that year rumours reached him that his wife had been misconducting herself in Sydney, and partly for the purpose of inquiring into the truth of those rumours, and partly to attend to his pecuniary affairs, he went to Sydney. He there ascertained that his wife was living in adultery with Captain Ogilvie, against whom he brought an action for damages, but before it came to trial Captain Ogilvie died. In May, 1859, the petitioner returned to England and instituted this suit.

The marriage, cohabitation, and adultery were proved by the depositions of witnesses who had been examined in Tasmania and at Sydney.

THE JUDGE ORDINARY: At present you have only established that the petitioner's domicil of origin was Scotch, and that he acquired an Australian domicil. There you leave him.

Dr. Phillimore said, if the case was allowed to stand over, he would produce oral evidence to prove that the petitioner's present domicil was English.

THE JUDGE ORDINARY said it was a very grave question whether, after a husband and wife had cohabited for a long series of years in a foreign country, and had there separated

by mutual consent, and the husband subsequently come England, he should be allowed to take advantage of the process of this Court to get a divorce. If he were called upon to decide the case upon the evidence as it now stood, he should decide against the petitioner.

1861.
March 1 and April 22.
BRODIE v. BRODIE.

The case was allowed to stand over for further evidence and for argument.

April 22.

(*Before the Full Court,*—JUDGE ORDINARY, WIGHTMAN, *and* WILLIAMS, J.J.)

Dr. Phillimore, Q.C., stated that this was a petition for dissolution of marriage by George Sinclair Brodie, of Paddington, in the county of Middlesex, against his wife, residing in New South Wales. On the former hearing the Judge Ordinary was satisfied as to the fact of adultery.

THE JUDGE ORDINARY: But I think you must give the evidence again: the other members of the Court may not now be satisfied.

The evidence taken by commission was then read.

Dr. Phillimore: I feel some difficulty how to deal with the case. To prove the domicil in this country I must show facts and intention. The petitioner alone can give primary evidence of the latter, he being alive; but by the general rule of the Court he cannot prove his own case. The question is, whether I can give secondary evidence of intention, as in testamentary cases, where the testator is dead and the secondary evidence is the best that can be produced. I can prove, by the son of Mr. Brodie, declarations made by him.

BY THE COURT: The son may be able to give a good deal of legitimate evidence. We had better decide the admissibility when the questions are asked.

1861.
March 1 and April 22.

BRODIE v. BRODIE.

James Mackenzie Brodie examined: I am a son of the petitioner and a clerk in Mittofer's house, my father's agent. I was with my father in Melbourne; in 1848 myself came thence to Scotland, and was at school in Scotland for nearly three years. My father landed in England in June, 1851, and came to Edinburgh, where he took a house, which he retained for three years, and was then for a time at the Bridge of Allan. He brought all his children, but one son, with him in 1851. In 1852 he went alone to Melbourne and returned. In 1854 he took a house in Gloucester Terrace, Paddington. Two of my sisters were with him there; three others were at school at Brighton. He was in Gloucester Terrace till 1855; then in Craven Hill Gardens, Bayswater, till August, 1857; thence to Malvern. At these places he had furnished houses. About then I went to Cambridge. In the early part of 1858 my father went alone to Australia, his family remaining at Brighton. He returned in the spring of 1859, and afterwards was in Oxford Terrace; then bought a term of years of a house in Hyde Park Square.

The lease was put in, and the signatures of the vendor and purchaser proved.

BY THE COURT: Declarations, accompanying acts, before suit moved, seem to us admissible.

In answer to questions by the Court, the witness further stated: The petitioner sold his house in Edinburgh, which he had bought in 1851, with the view of coming to reside in London. He said so at the time. I am not aware that he ever had other property in Scotland. He is in no business now. He is still the owner of property in Australia. Rents are remitted to him.

William Westgar examined: I was at Melbourne from 1841 to 1857. I knew Brodie, the petitioner, there; in November,

1852, I purchased a sheep station from him; at that time I understood from him that he was selling off to return home and live in this country. I visited him in 1859 in Hyde Park Square.

1861.
March 1 and April 22.
BRODIE v. BRODIE.

BY THE COURT: The question is whether the petitioner has acquired an English domicil; what sort of domicil must her husband have to make the wife domiciled here, she never having been in this country since the marriage?

Dr. Phillimore: I submit that enough has been proved to establish domicil for the purpose of founding jurisdiction; whether it would be sufficient for other, *e.g.* testamentary purposes, may be another question. Here is a *bonâ fide* residence in this country, with the intention of its being permanent.

BY THE COURT: We say nothing as to what the effect of the evidence might be in a testamentary suit; we think that the petitioner was *bonâ fide* resident here, not casually, or as a traveller; after he became resident here his wife was carrying on an adulterous intercourse in Australia. He is, therefore, entitled to a decree *nisi* for a dissolution of his marriage.

(*Before the* JUDGE ORDINARY.)

April 16.

GRAY v. GRAY (and the Queen's Proctor intervening).

GRAY v. GRAY.

Petition for Dissolution of Marriage and Decree Nisi.—*Intervention of Queen's Proctor.—Motion to take Petition off the File.*—23 & 24 *Vict. c.* 144, *s.* 7.

Where, after a decree nisi for dissolution, the Queen's Proctor has obtained leave to intervene, and has pleaded an admissible plea, and

1861. April 16.

GRAY v. GRAY.

prayed that the petition be dismissed and the party or parties condemned in costs, the petitioner will not be allowed to withdraw from a full investigation of the matters alleged by taking the petition off the file.

This was originally a petition for dissolution of marriage at the suit of the wife by reason of the adultery and bigamy of the husband. No appearance had been given by the respondent, and on proof of the facts alleged in the petition, the Judge Ordinary, on the 17th of January, 1861, made a decree *nisi* for dissolution of the marriage; on the 20th of March the Queen's Proctor obtained leave of the Court to intervene, and on the 27th of March delivered the following pleas:—

1. That the said petitioner has been acting in collusion with the respondent, Richard Thomas Clement Gray, for the purpose of obtaining a divorce contrary to the justice of the case. 2. That divers material facts respecting the conduct of the said petitioner and the said respondent have not been brought before the Court. 3. That, at the time when the said petitioner presented her petition for dissolution of marriage, she was and had been for some years previously and habitually committing adultery with Thomas Kendall, an omnibus proprietor. 4. That from the autumn of the year 1850, down to the middle of the year 1852, the said petitioner was in the constant habit of meeting the said Thomas Kendall at the Red Cow Tavern, Dalston, in the county of Middlesex, and of there committing adultery with him. Paragraphs five, six, and seven, contained similar charges, and the prayer was, that the Court would be pleased to refuse to make the said decree *nisi* absolute, and further, to dismiss the petition of the said Mary Louisa Gray, and to condemn her, and the said Thomas Clement Gray, or such of them as it shall see fit, in the costs arising from the Queen's Proctor's intervention. Upon this, the attorney for the petitioner gave notice to the Queen's Proctor, that he intended to move the Court by counsel, that the petition filed in this suit by the petitioner praying for a

dissolution of her marriage with the above-named respondent be taken off the file of the Court.

1861.
April 16.

GRAY
v.
GRAY.

Dr. Wambey moved the Court accordingly.

The *Attorney-General*, Sir R. Bethell (*Dr. Phillimore*, Q.C. with him), *contrà*: As this was the first case which had arisen under 23 & 24 Vict. c. 144, s. 7, he felt it his duty to resist the present motion. The Queen's Proctor having filed pleas containing such allegations, he submitted that it would be contrary to the interests of public justice, that at this period parties should be able to withdraw from a full investigation of the matter, and to avoid a determination of the suit on the facts established by that intervention.

Dr. Wambey submitted that the object of the Queen's Proctor's intervention would be attained by the present motion, and it could hardly be for the interests of public morality, that more details than necessary in such cases should be exposed.

THE JUDGE ORDINARY: I am of opinion that I ought not to grant the present application. I think the interests of the public are largely concerned, that public morality is concerned, that a sham case founded on collusion should be fully exposed. I think the petitioner cannot be allowed thus to defeat this proceeding, taken under the direction of the Attorney-General. A further object of the Legislature probably was, that costs might be inflicted on one or other of the parties. I reject this motion; and make no order at present as to the costs of it.

1861.
June 3.

GRAY v. GRAY.

(*Before the Full Court,*—THE JUDGE ORDINARY, WIGHTMAN, *and* WILLIAMS, J.J., *on Appeal from the Decision of the Judge Ordinary.*)

GRAY *v.* GRAY, and the Queen's Proctor intervening.

Decree Nisi *for dissolution.—Intervention of Queen's Proctor. —Motion on behalf of Petitioner to take petition off the file. —23 & 24 Vict. c.* 144, *s.* 7.

C., the wife, obtained a decree *nisi* for dissolution of her marriage, the husband not appearing, after which the Queen's Proctor intervened and pleaded collision between petitioner and respondent, and alleged that the petitioner had herself been living in adultery, and prayed to dismiss the petition and condemn the parties, or one of them, in costs; whereupon the Judge Ordinary was moved on behalf of the petitioner to direct the petition to be taken off the file of the Court, which he refused to do, and it was held, on appeal to the full Court, that the Judge Ordinary was right in such refusal.

QUÆRE, if the petitioner had prayed to dismiss her petition on payment by her of the costs incurred up to that time by the Queen's Proctor's intervention.

This was an appeal from a decision of the Judge Ordinary, by which he refused to allow a petitioner who had obtained a decree *nisi* for the dissolution of her marriage to take the petition off the file of the Court after the Queen's Proctor had intervened, and pleaded collusion between the petitioner and respondent, and alleged the adultery of the petitioner. (*Supra,* p. 263.)

Mr. M. Chambers, Q.C., and *Dr. Wambey,* in support of the appeal. The petitioner is not in a position to deny the adultery alleged by the Queen's Proctor, but she cannot admit the collusion. It would be useless, however, for her to go on and contest this point, for if she succeeded on the latter point, the fact of her adultery would disentitle her, it is presumed, to the relief she originally prayed. This being so, is it the meaning of 23 & 24 Vict. c. 144, s. 7, that the Court should oblige

a petitioner to go into such an investigation with the view to inflict a penalty in the nature of costs? It would seem that the object which the Legislature had in view when it gave the Queen's Proctor the power of intervening is answered by the defeat of the petitioner's original prayer.

BY THE COURT: There seems to be this difficulty. If the petition is simply taken off the file, which is all the petitioner has asked to do, there will be nothing for the future to show the nature of the proceedings. Again, the Queen's Proctor has alleged collusion as against the husband. Can the petitioner, by taking the proceedings off the file, hinder him from going on to prove that? Who is to pay the costs at present incurred by the Queen's Proctor's intervention? Are they at once to be thrown upon the public? We cannot condemn the husband in them, on the assumption that the wife admits collusion; and she has made no offer to pay the costs.

After consultation, the Court did not call upon *Sir F. Slade*, Q.C., and *Dr. Spinks*, who appeared for the Attorney-General.

WIGHTMAN, J., said: I am of opinion that this application must be refused. The application simply was, that the petition should be taken off the file. It is, apparently, wholly in the discretion of the Court whether to permit such a step or not. The application might have been of another kind. The petitioner might have moved to have her own petition dismissed; and then the question would have arisen, on what terms, if at all, such application should have been granted. As the application stands, it proposes to leave the question of costs wholly undetermined. It is clear that the 7th section of the Act contemplated cases in which the parties to the suit might be condemned in the costs arising from the Queen's Proctor's intervention:—"And it shall be lawful for the Court "to order the costs of such counsel and witnesses, and other-

1861. June 3.

GRAY v. GRAY.

"wise, arising from such intervention, to be paid by the parties, "or such of them as it shall see fit, including a wife, if she shall "have separate property; and in case the said proctor shall not "thereby be fully satisfied his reasonable costs, he shall be en- "titled to charge and be reimbursed the difference as part of "the expense of his office." In the present case the husband (the respondent) did not appear; but the Queen's Proctor intervened after the decree *nisi*, and on certain allegations, among which is one of collusion between the petitioner and the respondent, has prayed that the petition be dismissed, and that the parties, or such of them as the Court thinks fit, be condemned in the costs. Then the wife prays to have her petition taken off the file, and by her counsel says:—"I cannot "deny the adultery, but I deny the collusion; but it would "do me no good to prove this denial, for the suit, as far as I "am concerned, is at an end on the admission of my adultery." This seems to have been a most proper case for the Queen's Proctor to have intervened—one in which a dissolution of the marriage would have been decreed under circumstances in which it ought not if it had not been for such intervention—just one of the cases the Act was passed to meet. Then, who is to pay? If the public is not to pay at once, how can it be decided whether the parties, or either of them, should pay without trying the fact of collusion. We cannot make the husband pay for this intervention on the mere admission of the other party that there has been collusion. I am of opinion that the Judge Ordinary did quite right in rejecting this application.

WILLIAMS, J.: I quite agree.

Judgment of the Court below affirmed.

1861.
April 18 and May 8 and 15.

(*Before the* JUDGE ORDINARY.)

DRUMMOND (commonly called Viscountess Forth) *v.* DRUMMOND (commonly called Viscount Forth), and the Queen's Proctor intervening.

DRUMMOND v. DRUMMOND.

Wife's Petition for Dissolution.—Intervention of Queen's Proctor.—Adultery proved against Petitioner.—23 and 24 Vict. c. 144, s. 7.

To the wife's petition for dissolution by reason of the husband's cruelty and adultery he did not appear, but the Queen's Proctor obtained the leave of the Court to intervene, and pleaded collusion and adultery of the petitioner. At the hearing, petitioner's counsel objected to the right of the Queen's Proctor, under the statute, to plead anything except collusion, but the Court overruled the objection, and held that the Queen's Proctor might go on to prove adultery. Petitioner's counsel asked leave to change the prayer of the petition from dissolution to judicial separation, which the Court refused. Evidence was then given of the cruelty of the respondent, and of the adultery of the petitioner subsequently to the filing of the petition, and the Court dismissed the petition, holding that a wife guilty of adultery was not entitled to petition in this Court on the ground of any matrimonial offence committed by the husband.

This was a petition for dissolution of marriage, at the suit of the wife, on the ground of the husband's adultery and cruelty.

The parties were married in October, 1855, and lived together till the end of 1858. The petition charged adultery with various women, from September, 1859, to February, 1860, and many acts of cruelty during the cohabitation. The petition was filed on the 17th of March, 1860, and the respondent had not appeared. The Queen's Proctor had intervened under 23 & 24 Vict. c. 144, s. 7, and had pleaded that the petitioner and respondent were acting collusively, for the purpose of obtaining a divorce contrary to the justice of the case; that the respondent had filed no answer; and that since the

1861. April 18 and May 8 and 15. DRUMMOND v. DRUMMOND.

petition was presented, the petitioner had been living in adultery; and prayed to dismiss the petition, and that the costs should be paid by the parties, or one of them.

The petitioner, by her reply, denied the collusion and adultery.

Mr. K. Macaulay, Q.C., and *Mr. Markham* for the petitioner.

Mr. Serjt. Pigott and *Dr. Spinks* (with whom was the *Attorney-General*), for the Queen's Proctor.

Mr. Macaulay submitted that, under the language of the 23 & 24 Vict. c. 144, it was not competent to the Queen's Proctor to allege the adultery of the petitioner; all he could do was to allege collusion.

THE JUDGE ORDINARY: In that case the pleas should have been demurred to. As they are all traversed, I shall try them, and make a decree on all the circumstances of the case. If the parties are dissatisfied, it may be reviewed by the House of Lords.

Mr. Macaulay then opened the petitioner's case, in the course of doing which he stated that he was not in a position to establish the identity of Lord Forth in respect of the charges of adultery, which he therefore abandoned; and on the proof of cruelty, of which he had no doubt, he should ask for a decree of judicial separation, and as against that he should contend that the Queen's Proctor had no right to be heard.

Mrs. Capel, the mother of the petitioner, was then called, and proved the marriage.

On *Mr. Serjt. Pigott* rising to cross-examine the witness,

1861.
April 18 and May 8 and 15.

DRUMMOND v. DRUMMOND.

Mr. Macaulay repeated his objection to the Queen's Proctor being heard in the present aspect of the case, and asked to amend the prayer of the petition by substituting judicial separation for dissolution.

THE JUDGE ORDINARY: I shall not at this stage allow any amendment. I think the Queen's Proctor, having intervened in a petition for dissolution of marriage, has a right to take part in the trial.

The cross-examination of Mrs. Capel elicited that since the spring of 1860, the petitioner had been living in adultery with Mr. Dering.

The petitioner's own evidence, corroborated by her mother's, established a gross case of cruelty.

Mr. Macaulay submitted that the cruelty was fully proved, and that the petitioner was entitled to a decree for judicial separation on that ground.

Mr. Serjt. Pigott suggested that, as a new question seemed to arise on this alteration of the prayer of the petition, the case should be adjourned for further argument, and it was so agreed.

May 8.

The case came on again for argument on the facts proved, namely, the cruelty of the respondent, and the adultery of the petitioner since the petition filed.

Mr. Macaulay and *Mr. Markham* for the petitioner.

The *Attorney-General*, Sir R. Bethell, (*Mr. Serjt. Pigott* and *Dr. Spinks* with him,) for the Queen's Proctor.

Mr. Macaulay said he must admit that the adultery of the

1861. April 18 and May 8 and 15. DRUMMOND v. DRUMMOND.

petitioner was proved; he should now ask to go further, and give evidence to show the whole of the merits of petitioner's case as against her husband, and the whole of his demerits. The Court may consider whether, under very gross circumstances of conduct on the husband's part, the petitioner should be debarred of the remedy and protection which she sought, viz. a decree for judicial separation. He should further contend that, under the present aspect of the case, and with reference to the terms of the 7th section of 23 & 24 Vict. c. 144, the Attorney-General had no right to be heard to argue against the decree for judicial separation; but that, if he had, he was only at liberty to prove collusion, in respect of which he was authorized to state, as far as counsel could be authorized to state facts, that no ground or pretence for a charge of collusion ever existed; none certainly had been proved.

The Attorney-General: It has been stated that there was no ground for the suggestion of collusion. This I beg leave to deny. I had ground for believing there was collusion, but not the means of proving it. If I had in this case, and whenever I shall have in any other, I wish it to be publicly understood that I would have prosecuted, and that I will prosecute, the parties in the Central Criminal Court. The position of the case is this:—Here is a petition for dissolution of marriage by a woman. She is shown to have been guilty of adultery pending the suit; my application is, that the petition be dismissed. If it is to be treated as a suit for judicial separation, and the Court, under the 22nd section of the Divorce Act, is to give relief on principles and rules as nearly as may be conformable to those on which the Ecclesiastical Courts acted, the question will be, whether cruelty can entitle the wife to a decree, she having been guilty of adultery? It has been held that cruelty cannot be pleaded by the wife in bar to the husband's suit on the ground of her adultery (*Dillon* v. *Dillon*, 3 Curt. 92; and *Chambers* v. *Chambers*, referred to in *Dillon*,

1861.
April 18 and May 8 and 15.
DRUMMOND v. DRUMMOND.

and reported in 1 Consist. 452); but it does not seem to have been held that the wife's adultery would be no bar to her suit on the ground of the husband's cruelty. In the former case there are some notable remarks of Dr. Lushington bearing on the point:—"Now, on referring to the cases, I find it laid "down in several of them that cruelty cannot be pleaded in "bar to adultery. I myself so held in *Harris* v. *Harris*, 2 "Hagg. 411; and on referring to my own note of the judg- "ment, I find that I relied upon the doctrine of Lord Stowell "in *Chambers* v. *Chambers*, where he expressly lays it down "as a general doctrine that the wife cannot plead cruelty as a "bar to divorce for her violation of the marriage bed. The "reason he assigns for this is, that compensation can only "arise where both parties are *in eodem delicto*, and that in "cases of cruelty and adultery the *delictum* is not of the same "kind. I candidly say, I entertain doubts whether the reason "given is the most satisfactory that could be adduced, because "if the effect arises out of the difference in the nature of the "two offences, it follows, *è converso*, that where the wife has "brought a suit on account of cruelty, the husband cannot "plead her adultery in bar—a proposition which I am not "aware has ever been laid down in these courts. Perhaps the "more correct, because the more satisfactory reason may be, "that if the husband has been guilty of cruelty before the wife "is charged with having committed adultery, she might have "had redress by proceeding for a separation before the time "when the adultery was committed. No cruelty can, as Lord "Stowell has said, justify the violation of the marriage bed." *Proctor* v. *Proctor*, 2 Consist. 292, is conclusive that the husband's adultery subsequent to the wife's, would bar his remedy by reason of her adultery.

Mr. Macaulay in reply.

THE JUDGE ORDINARY: As to permission to go into a new

1861.
April 18 and May 8 and 15.

DRUMMOND v. DRUMMOND.

May 15.

case now, it is quite clear that that is out of the question. As to the other points raised, I will take time to consider them. *Cur. adv. vult.*

THE JUDGE ORDINARY: This was a suit by the wife for dissolution of marriage by reason of the adultery and cruelty of the husband. The respondent did not appear, but before the hearing, the Queen's Proctor, by direction of the Attorney-General, obtained leave to intervene, and pleaded. At the trial, Mr. Macaulay first questioned whether the Queen's Proctor had a right to plead anything but collusion. I thought he had, and that he was at liberty to prove the charge of adultery. Mr. Macaulay then asked leave to amend the prayer of the petition, by asking for a judicial separation instead of dissolution, with a view of contending that the Attorney-General would have no right to be heard unless it were a petition for dissolution. I thought that the party, having put the petition for dissolution on the file, could not be allowed to defeat the right of the Attorney-General by such an amendment. The case of adultery against the petitioner was made out by the cross-examination of her own witness, and the case stood over for further argument; and I, since that, have taken time for consideration. The case now for my decision, assuming the preliminary points to have been rightly decided, is this: a petition for dissolution, evidence of cruelty, a case of adultery against the petitioner proved by the Queen's Proctor. It was argued that that was no answer to the wife's petition for cruelty. But I think that a wife guilty of adultery cannot be a petitioner in this Court on the ground of any matrimonial offence of the husband, and I dismiss this petition.

1861.
April 22.

BOYNTON
v.
BOYNTON.

(*Before the Full Court,*—THE JUDGE ORDINARY, WIGHTMAN, *and* WILLIAMS, J.J.)

BOYNTON *v.* BOYNTON.

Dissolution of Marriage.—Custody of Child.—Application of Money under Settlement, 20 & 21 *Vict. c.* 85, *s.* 35; 22 & 23 *Vict. c.* 61, *ss.* 4 *and* 5.—*Costs.*

When the wife succeeds in her suit against the husband, she will generally be entitled to the custody of the children; and where the husband takes an interest in the income of the wife's money under settlement, the Court will direct the application of such interest in favour of the mother or the child.

This was originally a suit for dissolution of marriage at the petition of the wife, by reason of adultery and cruelty. The case had been heard before a jury, who found a verdict for the petitioner, on which a decree of dissolution of marriage had been subsequently made.

The case now came before the Court on the mother's petition: first, as to the application of certain property under a marriage settlement; and, secondly, for the custody of the child.

Mrs. Boynton was entitled, under the will of her father, to about £19,000 stock. In July, 1849, Mr. Boynton had eloped with her, she being then a minor, and they were married at St. George's, Hanover Square. A post-nuptial settlement of her property was made, to the following effect:—Two thirds of the income to the use of the wife for life, one third to the husband, with benefit of survivorship respectively, and after the death of the survivor for the children. The trustees of the settlement had since the commencement of this suit had recourse to Chancery, and the property was now in the hands of the Accountant-General of the Court of Chancery, under order to pay the income according to the deed of settlement.

1861.
April 22.

BOYNTON
v.
BOYNTON.

On the 22nd of December, 1858, an interim order was made (1 Swab. and Trist. 324) for the custody of the child, a boy then about eight years old, by which he was placed under the care of Lady Boynton, Mr. Boynton's mother, and was at the time of the present application at school at Bridlington Quay.

Mr. K. Macaulay, Q.C., and *Mr. T. Jones*, for the mother, asked for the custody of the child, relying on the principle laid down in *Marsh* v. *Marsh*, 1 Swab. and Trist. 312, that this Court was not bound by the rules of the Common Law or Chancery Courts in such matters, but would do what was just and proper with reference to the circumstances of the suit, and that when a mother was entitled to the relief provided by law, she was not to purchase it at the price of losing the society of her children, which should fall upon the wrong-doer. As to the father's interest under the settlement, they asked for an order directing its application in favour of the mother during her life, and in case of her predeceasing Mr. Boynton, in favour of the child, as if Mr. Boynton were dead.

Dr. Spinks for Mr. Boynton: As to the custody of the child, in this case there is no sufficient reason to deprive the father of his common-law right; the child is near ten years of age. It was not a case of gross cruelty.

BY THE COURT: We cannot discuss that now; you must take the cruelty and adultery as facts.

Mrs. Boynton has shown very little interest in, or affection for the boy; has never seen him since the interim order in 1858. As to the interest under the settlement, the parties seem to have elected another remedy, by causing the money to be paid into Chancery. At all events, it would be harsh to deprive Mr. Boynton of his interest in the one-third, for

after sixteen years of age the boy will be at liberty, and may choose to go to his father, who will be liable for his maintenance and education.

THE JUDGE ORDINARY: My learned brothers desire me to say that they agree with me in the construction which I put upon the 35th section of the Divorce Act, in the case of *Marsh* v. *Marsh*. The question is, what is "just and proper" as regards the custody of the child, under the circumstances of the case, and bearing in mind the interest of the child? We think it would not be just to leave the custody of the child in the father, when the marriage has been dissolved by reason of his misconduct, the wife not having been to blame. As to the settlement also, what he loses he loses by reason of his own fault; he ran away with a minor, and under pressure of some sort from her family consented to a post-nuptial settlement; it would be a strange result of the present state of the law, if he could retain the property which originally belonged to the woman, when he has so entirely failed of his duties as a husband. We think he must be deprived of his interest under the settlement. We direct that, till further order, what would be paid to him be paid to the mother, and in the event of his surviving her, the whole to the child. If in this case, as the fund has been paid into Chancery, an application to that Court is necessary, we presume it will carry out this direction. The custody of the child, till further order, to be with the mother, with provision for reasonable access for the father, and the child not to be taken out of the jurisdiction of the Court without leave. If necessary, the Court will settle the precise terms of the order. No order as to costs of this application, as she has the whole income.

1861.

April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

(*Before the Full Court,*—THE JUDGE ORDINARY, WIGHTMAN, *and* WILLIAMS, J.J.)

WING *v.* TAYLOR (falsely calling herself WING).

Suit for Nullity.—Intercourse before Marriage with Wife's Mother.—Affinity.—Marriage in a Vestry.—One Witness.

B. petitioned for a decree of nullity of marriage on the ground that he had intercourse with his wife's mother before the fact of marriage with his alleged wife, which intercourse he averred brought him within the prohibited degrees of affinity in respect of marriage established by the law of England.

But, on demurrer to this petition, the Court held that affinity could not be so constituted by the law of England, and that the 28th Hen. VIII. c. 7, had been repealed and not revived by any subsequent statute.

That a marriage solemnized in a vestry belonging to and abutting on the church was a good marriage.

That a marriage solemnized in the presence of one witness only is a good marriage.

This was a question arising on demurrer to a petition for a decree of nullity of marriage, filed by the man against the woman.

The petition stated—First, that a pretended marriage was, on the 14th of December, 1855, in fact illegally had, solemnized, and celebrated in the vestry-room belonging to and abutting on the parish church of the parish of Hedon, in the county of York, between the petitioner and Ann Taylor, spinster, falsely calling herself Ann Wing.

Secondly, that prior to the time of the said pretended celebration of the said pretended marriage, the petitioner had on divers occasions carnal connection with Mary Taylor, the natural and lawful mother of the said Ann Taylor, now falsely calling herself Ann Wing, at the Constable Arms, in Hedon aforesaid, being the residence of the said Mary Taylor; that at the time of the celebration of the said pretended marriage, the said Ann Taylor, now falsely calling herself Ann Wing,

April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

was well aware that the petitioner had carnal connection with her said mother, Mary Taylor, as aforesaid; that by reason of the petitioner having had such carnal connection with the said Mary Taylor, the said mother of the said Ann Taylor, falsely calling herself Ann Wing, prior to the celebration of the said pretended marriage, the petitioner and the said Ann Taylor, falsely calling herself Ann Wing, were in law deemed to be, and in fact were at the time of the celebration of the said pretended marriage, within the prohibited degrees of affinity, and that the said pretended marriage was and is therefore null and void to all intents and purposes whatsoever.

Thirdly, that the whole of the ceremony of the said pretended marriage was performed and solemnized in the vestry-room belonging to and abutting on the said parish church of Hedon aforesaid; that the petitioner, the said Ann Taylor, falsely calling herself Ann Wing, William Wasse, clerk to the then rector of the said parish of Hedon, who was the only officiating minister at the solemnization of the said pretended marriage, and Samuel Wasse, who was the only credible witness present at the said pretended marriage, and who was the only credible witness who signed the attestation thereof, were the only persons present at the solemnization of the said pretended marriage; that they were all present in the said vestry-room during the whole time of the pretended, etc.; that by reason of the premises the said pretended marriage was solemnized contrary to the Rubric, and to the provisions of the statutes in that case made and provided, and was and is therefore null, etc.

Fourthly, that after the solemnization of the said pretended marriage, the petitioner lived and cohabited with the said Ann Taylor, spinster, falsely calling herself Ann Wing, until the month of July, 1854, when he separated from her, and that he has since lived separate and apart from her.

Fifthly, that the petitioner discovered during the present month of January, 1861, for the first time, that the said pretended marriage was absolutely null and void.

1861.
April 22 and 23 and June 3.

WING
v.
TAYLOR
(falsely calling herself WING).

Prayer for decree of nullity of marriage.

Demurrer to this petition on the grounds, first, that the circumstances stated do not in law show the petitioner to have been within the prohibited degrees of affinity to the respondent, so as to render their marriage void.

Secondly, that the circumstances stated do not show that their marriage was celebrated contrary to the provisions of the Rubric or any statutes, so as to render their said marriage void.

Joinder in demurrer.

Dr. Spinks in support of the demurrer: The main question is, what are the prohibited degrees of affinity? The first statute with which we are concerned is the 25 Hen. VIII. c. 22, entitled, "An Act concerning the King's Succession," the 3rd section of which states certain prohibited degrees within which "marriages, albeit they be plainly prohibited "and detested by the laws of God, yet, nevertheless, at some "times they have proceeded under colours of dispensations "from man's power, which is usurped, and of right ought not "to be granted, admitted, or allowed," etc.

There is clearly nothing in the Act on which the present petition can be founded; it is presumed that the 9th and 10th sections of the 28 Hen. VIII. c. 7, are relied upon; they are as follow:—"Sect. 9. And furthermore, since many incon- "veniences have fallen, as well within this realm as in others, "by reason of marrying within the degrees of marriage pro- "hibited by God's laws, that is to say, the son to marry the "mother, or the step-mother carnally known by his father, "the brother the sister, the father his son's daughter or his "daughter's daughter, or the son to marry the daughter of "his father, procreate and borne by his step-mother, or the "son to marry his aunt, being his father or mother's sister, "or to marry his uncle's wife carnally known by his uncle, or "the father to marry the son's wife carnally known by his

"son, or the brother to marry his brother's wife carnally "known by his brother, or any man married and carnally "knowing his wife to marry his wife's daughter or his wife's "son's daughter, or his wife's daughter's daughter, or his "wife's sister.

"Sect. 10. And further to dilate and declare the meaning "of these prohibitions, it is to be understood that if it chance any "man to know carnally any woman, that then all and singular "persons being in any degree of consanguinity or affinity, as is "above written, to any of the parties so carnally offending, "shall be deemed and adjudged to be within the cases and "limits of the said prohibitions of marriage," etc.

The 11th section, referring to the 25 Hen. VIII. c. 22, prohibits all marriages within the degrees before rehearsed. This statute is not generally printed in the collection of the statutes, but these sections may be found in Gibson's Codex (A.D. 1761), p. 410. This Act is in part repealed by 1 & 2 Phil. & M. c. 8, s. 18:—"And also that part of the Act made "in the said twenty-eighth year of the said king, entitled, "'An Act for the establishment of the succession of the Im-"'perial Crown of the realm that concerneth a prohibition to "'marry within the degrees expressed in the said Act.'" The 1 Eliz. c. 1, re-enacts many of the statutes repealed by 1 & 2 Phil. & M.; but the 28 Hen. VIII. c. 7, is not expressly mentioned, and the 13th section declares, "that all "other laws and statutes, and the branches or clauses of any "Act or statute repealed and made void by the said Act of "repeal made in the time of the late King Philip and Queen "Mary, and not in this Act specially mentioned and revived, "shall stand, remain, and be repealed and void," etc. The 28 Hen. VIII. c. 16, is re-enacted, and the 2nd section of that Act has some reference to the 28 Hen. VIII. c. 7. But it is submitted that the real exposition of the law of England in respect of the prohibited degrees is to be found in 32 Hen. VIII. c. 38, and it cannot be suggested that the mar-

1861. April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

riage in question could be held void under that Act. Since the date of these statutes I can find no trace of any decided case in which such a marriage has been held void.

As to the place and mode of celebration, it is not stated that the particular vestry-room formed no part of the church, and *primâ facie* the vestry is part of the church (*Wilson* v. *M'Math*, 3 Phill. 82). The 21st section of the Marriage Act, 4 Geo. IV. c. 71, may require two witnesses, but there is no enactment declaring that their absence shall make the marriage void.

April 23. *Dr. Tristram, contrà:* The first question is, whether such affinity as will avoid a marriage springs from carnal connection, though not accompanied by marriage. I admit that I can find no decided case in the Ecclesiastical Courts directly in point, but I apprehend that a reference to the statutes and books will show that such affinity may be constituted by carnal connection without the fact of marriage. It is certain from the following authorities, that before the statutes of Henry VIII., both by the canon law, and by the common law of England, a marriage such as the present might be avoided on the ground of the affinity of the parties: Sanchez, De Matrimonio, lib. 7, disputatio 64, tit. 1: "Ita affines, sunt "consanguinei alterutrius conjugis alteri conjugi. . . . Est "propinquitas personarum ex carnali copulâ proveniens omni "carens parentelâ. Et dicitur generaliter, ex copulâ, quia "oritur ex copulâ licitâ vel illicitâ." Tit. 3: Omnes "autem consanguinei uxoris Petri, vel mulieris ab eo "illicitæ cognitæ, sunt Petro affines in eo gradu in quo sunt "consanguinei talis mulieris." Tit. 16: "Sexto infertur non "audiendos esse quosdam Doctores asserentes ex copulâ il- "licitâ naturali non oriri affinitatem, sed solum ex copulâ "conjugali. . . . . Nec obstat . . . non oriri affinitatem quoad "delationem hæreditatis vel tutelæ, secus quoad matrimonii

"prohibitionem.[1] Tandem constat ex Tridentino, Sess. 24, de "matrimonio, c. 4, oriri ex fornicatione affinitatem."[2]

In the note to the 380th section of Co. Litt. it is said: "There is a distinction to be understood, for there be two "kinds of divorces; one *à vinculo matrimonii*, etc. Divorces "*à vinculo matrimonii* are these: causâ præcontractus, causâ "metus, causâ impotentiæ seu frigiditatis, causâ affinitatis, "causâ consanguinitatis, etc. And I read in an ancient re- "cord, coram Rege, T. Pasch. 30 Ed. I. (*William de Chad- "worthe's Case*), that he was divorced from his wife, for that "he did carnally know her daughter before he married the

[1] So natural consanguinity is nothing in respect of rights to property, but in respect of marriage within the prohibited degrees it is equivalent to legitimate consanguinity arising from a legal marriage (*Reg.* v. *The Inhabitants of Brighton*, 5 (N. S.) L. T. R. 56; Q. B., June 26, 1861).

[2] The words are:—"Præterea sancta Synodus, eisdem et aliis gravissimis de causis adducta, impedimentum, quod propter affinitatem ex fornicatione contractam inducitur, et matrimonium postea factum dirimit, ad eos tantum qui in primo et secundo gradu conjunguntur, restringit: in ulterioribus vero gradibus statuit, hujusmodi affinitatem matrimonium postea contractum non dirimere."

So in the 'Reformatio Legum Ecclesiasticarum' (cited 1 Stephens's Eccl. Stat. 272), "Non solum in legitimis matrimoniis talem habent dispositionem qualem jam posuimus, sed eundem in corporum illegitimâ conjunctione locum habent; filius enim quo jure matrem non potest uxorem sumere, eodem, nec patris concubinam habere potest; et pater quo modo filii non debet uxorem contrectare, sic ab illâ se removere debet quâ filius est abusus; quâ ratione mater nec cum filiæ marito jungi debet, nec etiam cum illo congredi qui filiam oppresserit."

So in *Harrison* v. *Burwell*, Vaughan, R. 215. "Another alteration in this Act from the former is, that if any man carnally know any woman, all persons in any degree of consanguinity or affinity of the parties so offending, shall be adjudged to be within the said prohibitions, in like manner as if the parties so carnally knowing one another had been married. For example, if a man carnally know a woman, not marrying her, he is prohibited to marry her daughter or daughter's daughter, and *è converso*. In all other clauses this Act (28 Hen. VIII. c. 7) and the former of 25th are verbatim the same, and this Act is in force."

1861. April 22 and 23 and June 8.

WING v. TAYLOR (falsely calling herself WING).

"mother, all which are causes of divorce preceding the mar-
"riage. . . . And it is further to be understood that many
"divorces that were in force by the canon law when Little-
"ton wrote are not at this day in force, for by the statute
'32 Hen. VIII. c. 38, it is declared that all persons be law-
"ful (that is, may lawfully marry) that be not prohibited by
"God's law to marry, that is to say, that be not prohibited
"by the Levitical degrees."

Upon a fair construction of 32 Hen. VIII., it is submitted that by the present law affinity may be constituted by carnal connection, without the fact of marriage (see *Mrs. Addison's Case*, Macqueen's Practice of Lords, p. 476; Swinburne on Sponsals, s. 18, 10; 2 Burns Ecc. Law, by Phill. p. 445). It might, indeed, be contended on high authority that sections 9, 10, and 11 of 28 Hen. VIII. c. 7, are still in force as forming part of the statute law of England. These sections were first repealed by 1 and 2 P. and M. c. 8, sec. 19: and although they were not revived by 1 Eliz. c. 1, *totidem verbis*, it has been said that they were revived by implication by sec. 10 of that statute, which expressly revived 28 Hen. VIII. c. 16, wherein (sec. 2) these sections are referred to as being in force. See 5 Com. Dig. Parl. R. 9 *a*:—"So, though the words are that no "statute not expressly mentioned shall be revived, if thereby "another statute is revived, which mentions it to be in force, "as the statute 21 Hen. VIII. c. 13, of pluralities, being men-"tioned to be in force by the statute 25 Hen. VII. c. 21, which "was revived by the statute 1 Eliz. c. 1; though it says that "no statute repealed by 1 & 2 Phil. & M. stat. 8, shall be in "force if it be not specially revived."

But it is not necessary for me to rest this part of the petitioner's case on this argument. The proposition, on which I mainly rely in support of it, is, that this marriage is to be deemed to be within the Levitical degrees referred to in 32 Hen. VIII. c. 38, s. 2, and is therefore void by 5 & 6 Wm. IV. c. 54. My argument is as follows:—By 32 Hen. VIII. c. 38,

1861.

April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

s. 2, marriages within the Levitical degrees, or those prohibited by God's law, are invalid. This statute does not define what marriages are or are not within the Levitical degrees, or are or are not prohibited by God's law. This had been done by ss. 9, 10, 11 of 28 Hen. VIII. c. 7, which were then in force. At the time of the passing of 32 Hen. VIII. c. 38, the meaning of the term Levitical degrees was to be sought for, and would be the same as declared in 28 Hen. VIII. c. 7. When 32 Hen. VIII. c. 38 was revived by 1 Eliz. c. 1, it must have been revived with the same sense attaching to the term Levitical degrees as that which attached to it when it was originally enacted. In *R.* v. *Chadwick*, 11 Q. B. 205, it was clearly laid down that we are to look to 28 Hen. VIII. c. 7, ss. 9, 10, and 11, for the statutory exposition of the meaning of the term Levitical degrees in 32 Hen. VIII. c. 38. And the correctness of this principle of interpretation has been confirmed by the judgments of Lords Cranworth and Wensleydale, in the case of *Brook* v. *Brook*, recently decided in the House of Lords, 4 L. T. Rep. N. S. 97, 102. The point there was, how the law stood with respect to the marriage with a deceased wife's sister, which depends on the 9th section of 28 Hen. VIII. c. 7; but it seems impossible to separate the 9th and 10th sections. Lord Wensleydale's statement is very precise: "The state of the law appears to be thus: "The two statutes in which the term Levitical degrees "is explained are the 25 Hen. VIII. c. 22, where they "are enumerated and include a wife's sister; and the 28 "Hen. VIII. c. 7, in the 9th section of which are described "by way of recital the degrees prohibited by God's law in "similar terms, with the addition of carnal knowledge by the "husband in some cases, and with respect to them the prohi-"bition of former statutes was re-enacted. The whole of the "Act 25 Hen. VIII. c. 22, was repealed by a statute of Queen "Mary, and so was part of 28 Hen. VIII. c. 7, but not the "part as to prohibited degrees; that part was repealed by 1

June 3.

1861. April 22 and 23 and June 8.

WING v. TAYLOR (falsely calling herself WING).

"& 2 Phil. & M. c. 8. But by the 1 Eliz. c. 1, s. 2, that Act "was also repealed except as therein mentioned, and several "Acts were revived, not including the 28 Hen. VIII. c. 7, no "doubt because it avoided the marriage with Anne Boleyn. "But by the 10th section, the 28 Hen. VIII. c. 16 (which in "its 2nd section referred to marriages prohibited by God's "laws as limited and declared in the 28 Hen. VIII. c. 7, or "otherwise by Holy Scriptures), and all and every branches, "words, and sentences in the several Acts and statutes con- "tained, by the authority of this present Parliament, etc., "shall be revived, and shall stand and be in full force and "strength to all intents, constructions, and purposes. The "question is, whether that part of 28 Hen. VIII. c. 7, which "relates to prohibited degrees and describes them is thus "revived? I think it is. But whether it is or not, the state- "ments in the statute are to be looked at as a statutory ex- "position of the meaning of the term Levitical degrees, and "that is the clear opinion of Lord Denman and Coleridge, J., "in the case referred to."

As to the demurrer to the third paragraph of the petition, he admitted that there was a door opening from the vestry into the church, and he was then stopped in his argument by the Court.

PER CURIAM: We are clearly of opinion to allow the demurrer as to the third and fourth paragraphs of the petition. We think the marriage was valid, though celebrated in the vestry, and in the presence of one witness only.

Dr. Spinks in reply as to the question of prohibited degrees.

Cur. adv. vult.

THE JUDGE ORDINARY: This was a petition for a decree of nullity of marriage. The petitioner alleged that on the 14th of December, 1835, a pretended marriage was solem-

1861.
April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

nized between the petitioner, then a bachelor, and Ann Taylor, spinster, since falsely calling herself Wing; that before the time of the celebration of the said pretended marriage the petitioner had on divers occasions carnal connection with Mary Taylor, the natural and lawful mother of the said Ann Taylor, and that at the time of the celebration of the said pretended marriage this was known to the said Ann Taylor; that by reason of the said petitioner's having had such carnal connection with Mary Taylor, the said pretended marriage was wholly null and void; that after the said pretended marriage the petitioner cohabited with the said Ann Taylor until July, 1854, when he separated from her.

The petition also raised some questions as to the due celebration of the marriage, which it is unnecessary to mention now, as they were disposed of by the Court when the case was argued.

To this petition the respondent demurred, thereby admitting, for the purpose of the argument, the truth of the facts alleged. The question thus raised is of the utmost importance; for although it is alleged that the respondent knew that sexual intercourse had taken place between the petitioner and her mother, if in consequence of such intercourse the law holds the marriage null and void, it is immaterial whether the fact of such intercourse was known or not. If such be the law, the Court must pronounce a judgment in conformity with it, whatever be the consequences, one of which will obviously be that no marriage, however solemnized, can by any amount of care and caution be rendered secure against impeachment. It is difficult to imagine any state of things more injurious to the peace and happiness of families, and before the Court pronounces a judgment that would be attended with such a consequence, it should be most careful in examining the grounds upon which the petitioner claims to have his marriage declared null and void.

Very little is to be found in our law-books respecting marriage before the time of Henry VIII. In the ancient laws of

1861. April 22 and 23 and June 8.

WING v. TAYLOR (falsely calling herself WING).

England, published by the Record Commissioners, among the laws of King Edmund, I find under the head "Of betrothing a woman," sect. 9, the following:—"Well is it to be looked "to that it be known that they through kindship be not too "nearly allied, lest that be afterwards divided which before "was wrongly joined." In a note it is said, "The canons of "the time had fixed this in the seventh degree." Among the laws of King Ethelred, title 6, council of Enham, of the ordinances of the Witan, sect. 12, is the following:—"And let it "never be that a Christian man marry within the relation-"ship of six persons in his own kin, *i. e.* within the fourth "degree, nor with the relict of him who was so near in "worldly relationship, nor with the wife's relation whom he "before had had, nor with any hallowed nun," etc. Among the laws of Cnut is the following, "De Conjugiis prohibitis:" "—And we instruct and beseech and in God's name com-"mand that no Christian man ever marry in his own family "within the relationship of six persons, nor with the relict of "his kinsman who was so near of kin, nor with the relative "of the wife whom he had previously had, nor with his god-"mother, nor with a hallowed nun, nor with one divorced, "let any one marry, nor any fornication any one commit," etc. In none of these is there any suggestion that affinity would be established by carnal knowledge without marriage. The Canonists indeed so held, as may be read in Sanchez, 'De Matrimonio.' At p. 154, of *Constitutiones legatinæ Dom. Othoboni*, there is the following note on the word *consanguinitate*; "Quæ est vinculum diversarum personarum ab eodem "stipite descendentium carnali propagatione contractum; sed "affinitas est proximitas personarum ex carnali coitu pro-"veniens omni carens parentelâ." This may possibly mean that affinity is created by carnal intercourse alone, or by that and marriage; most probably the former is the true construction, but the definition is no doubt taken from the Canonists, and is no higher authority than Sanchez.

1861.
April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

In Co. Litt. 255, commentary on section 380, there is this passage:—"Divorces *à vinculo matrimonii* are these: causâ "præcontractus, causâ metus, causâ impotentiæ seu frigiditatis, "causâ affinitatis, causâ consanguinitatis, etc. And I read in "an ancient record, Coram Rege, Termino Pasch. 39 Ed. I. "(*William de Chadworthe's Case*), that he was divorced from "his wife for that he did carnally know her daughter before "he married the mother, all of which are causes of divorce "preceding the marriage." It is to be observed that Lord Coke does not state this to be the law when he wrote; and further on he says:—"And it is to be further understood that "many divorces that were of force by the canon law when "Littleton wrote are not at this day in force, for by the sta- "tute 32 Hen. VIII. c. 38, it is declared that all persons be "lawful (that is may lawfully marry) that be not prohibited "by God's law to marry, that is to say, that be not prohi- "bited by the Levitical degrees;" assuming that none were prohibited by God's law from marrying who were not within those degrees. It has been observed that God's law prohibits other marriages besides those between persons within the Levitical degrees, *e. g. causâ impotentiæ*, but probably it will not be found that God's law prohibits any person from marrying by reason of consanguinity or affinity, save those within the Levitical degrees, and it is plain that the statutes 23 Hen. VIII. c. 7, speaking of the degrees prohibited by God's law, meant the Levitical degrees, for it proceeds to define what the Legislature meant by God's law, thus, "that is to say," and then it specifies the degrees mentioned and set down in the 18th chapter of Leviticus. The important observation arising out of this passage in Co. Litt. is, that he considered that the statute of 32 Hen. VIII. c. 38, gave the law upon this subject, which we take to be correct.

On the argument of this case it was contended that the statute 28 Hen. VIII. c. 7 is still in force, and that it in terms prohibited such a marriage as that now in question. In order

1861. April 22 and 23 and June 8.

WING v. TAYLOR (falsely calling herself WING).

to settle this point, it is necessary to examine the various enactments on the subject of marriage, which followed each other in rapid succession during the reign of Hen. VIII. The first of them is the 25 Hen. VIII. c. 22, entitled "An Act concerning the King's succession." By the 2nd section it was enacted that the marriage of the King with the Lady Catherine should be deemed null and void, and his marriage with Queen Anne good. This was followed by a recital in these words:—"And furthermore, since many inconveniences have fallen, "as well within this realm as in others, by reason of marrying "within the degrees prohibited by God's laws, that is to say, "the son to marry the mother or the stepmother, the brother the "sister, the father his son's daughter or his daughter's daugh-"ter, or the son to marry the daughter of his father procreate "and borne by his stepmother, or the son to marry his aunt, "being his father's or mother's sister, or to marry his uncle's "wife, or the father to marry his son's wife, or the brother to "marry his brother's wife, or any man to marry his wife's "daughter, or his wife's son's daughter, or his wife's daughter's "daughter, or his wife's sister; which marriages, albeit they "be plainly prohibited and detested by the laws of God, yet "nevertheless at some time they have proceeded under colours "of dispensations by man's power, which is but usurped, and "of right ought not to be granted, admitted, or allowed; for no "man, of what estate, degree, or condition soever he be, hath "power to dispense with God's laws, as all the clergy of this "realm in the said convocations, and the most part of all the "famous universities of Christendom, and we also, do affirm "and think." The statute then prohibited the solemnization of marriages between parties within those degrees; and enacted that parties theretofore married within those degrees and not then separated should be separated by the sentence of the ordinary. Then followed several sections relating to succession to the Crown; and the last was in these words:—"Provided "always that the article in this Act contained concerning pro-

1861.
April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

"hibitions of marriages within the degrees afore-mentioned in "this Act shall always be taken, interpreted, and expounded "of such marriages, where marriages were solemnized and "carnal knowledge was had." If the question now to be determined had depended upon this statute, it would have been clear that marriage as well as carnal knowledge was necessary to create affinity so as to bring parties within the prohibited degrees, and it could not have been held that the law was still according to that which was decided in the ancient record in the time of Ed. I., mentioned by Lord Coke. Then came the 26th Hen. VIII. c. 2, prescribing an oath of allegiance.

The 28 Hen. VIII. c. 7, upon which the argument in support of the present petition was founded, repealed both the former Acts. This also was an Act "Touching the succession of the Crown;" it repealed the two statutes before cited; enacted that Queen Jane was the King's lawful wife; that the marriage of the King with the Lady Catherine was void, also the marriage with Lady Anne was void, and the issue born of those marriages illegitimate; then followed a recital in these words:—"Fur- "thermore, sith many inconveniences have fallen as well within "this realm as in others, by reason of marrying within the de- "grees of marriage prohibited by God's laws, that is to say, the "son to marry the mother or the stepmother carnally known by "his father, the brother the sister, the father his son's daughter, "or his daughter's daughter, or the son to marry the daughter "of his father procreate and borne by his stepmother, or the "son to marry his aunt, being his father's or mother's sister, "or to marry his uncle's wife carnally known by his uncle, or "the father to marry his son's wife carnally known by his son, "or the brother to marry his brother's wife carnally known "by his brother, or any man married and carnally knowing "his wife to marry his wife's daughter, or his wife's son's "daughter, or his wife's daughter's daughter, or his wife's "sister." "And furthermore, to dilate and declare the mean- "ing of these prohibitions, it is to be underderstood that if

1861. April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

"it chance any man to know carnally any woman, that "then all and singular persons, being in any degree of consanguinity or affinity as is above written to any of the "parties so carnally offending, shall be deemed and adjudged "to be within the cases and limits of the said prohibi-"tions of marriage." It then prohibits all persons from marrying "within the degrees afore rehearsed," and enacts, that "if any persons have been theretofore married within any such degrees, and have been separated by the ordinary, such separation shall be held good, and any so married and not yet separated shall be separated by the sentence of the ordinary, and such separation shall be held good and effectual," etc. Then follow clauses settling the succession to the Crown, and enacting that it shall be treason to say that the marriage of the King with the Lady Catherine or the Lady Anne was good, or the Lady Mary or Lady Elizabeth legitimate.

In the same session another Act, c. 16, was passed, entitled "A Provision for Dispensations and Licenses heretofore ob-"tained from the See of Rome." After reciting that the Bishop of Rome and his predecessors had theretofore exercised many usurped powers within the realm, it enacted "That all bulls, "breves, faculties, and dispensations heretofore had and ob-"tained of the Bishop of Rome shall from henceforth be "clearly void and of no value," etc. "Yet notwithstanding "it be enacted that all marriages had and solemnized within "this realm, or in any other the King's dominion before the "3rd day of November in the 26th year of the King's reign, "whereof there is no divorce or separation had by the ecclesi-"astical laws of this realm, and which marriages be not pro-"hibited by God's law, limited and declared in the Act made "in this present Parliament for the establishment of the "King's succession or otherwise by Holy Scriptures, shall be "by the authority of the present Parliament good, etc., as "though no impediment of matrimony had ever been between "them that have contracted and solemnized such marriages."

This statute did not prohibit any marriages, but rendered some unimpeachable, and was evidently intended to relieve parties from those prohibitions which had been invented by the See of Rome in order to extort money by granting dispensations, and which prohibitions were not warranted by God's law, and to protect those who had married after obtaining dispensation from the peril of having their marriages called in question in consequence of the enactment that all bulls, etc., theretofore obtained should be held void.

Then came the statute 32 Hen. VIII. c. 38, "For marriages "to stand notwithstanding precontracts." The preamble recites that theretofore "the usurped power of the Bishop of Rome "had always troubled the mere jurisdiction and regal power "of the realm of England, etc., whereof yet some sparks be "left." It then recites that upon pretence of precontracts not consummate, etc., marriages have been held void, and also by reason of kindred and affinity in certain outward degrees or carnal knowledge of any of the same kin which else were lawful, and not prohibited by God's law, and that thus no marriage could be secure, etc., and enacts "That from the "1st day of July next coming (1540) all and every such mar- "riages as within this Church of England shall be contracted "between lawful persons (as by this Act we declare all persons "to be lawful that be not prohibited by God's law to marry), "such marriages being contract and solemnized in the face of "the Church, and consummate with bodily knowledge, etc., "shall be, by authority of this present Parliament, judged and "taken to be lawful, good, and indissoluble, notwithstanding "precontract, etc., and that no reservation or prohibition, "God's law except, shall trouble or impeach any marriage "without the Levitical degrees." This statute does not refer to or incorporate the 28 Hen. VIII. c. 7. It does not affect to say what marriages without the Levitical degrees are prohibited by God's law.

The case mentioned in First Inst. has been already noticed.

1861. April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

The same case is mentioned in Second Inst. in "an exposition "upon the statute 32 Hen. VIII. c. 38, concerning what "marriages be lawful and what not." The title of which chapter shows that Lord Coke considered that statute as settling the law on that subject.[1] In page 684, after quoting part of the preamble, he says:—"And now, at this day, men "need not be at the charge and suit that Roger Donnington "was, who, for that he had committed fornication before "marriage with one that was of kin to his wife in the fourth "degree, was driven to sue for a legitimation of his marriage." What the nature of the suit was is not stated. Further on he repeats the statement of *Chaddeworth's Case* mentioned in the First Inst.:—"Alice de Stircheley took to husband William de Chaddeworth, and after, at her suit, was divorced "from him, and the cause of the divorce is expressed in the "record, 'Et fuit causa divortii eo quod dictus William de "'Chaddeworth carnaliter cognoverat quandam filiam dictæ "'Aliciæ Stircheley antequam ipsam desponsavit.' By the "Levitical degrees it is prohibited that a man shall not uncover the nakedness of his wife and of her daughter; and "so it is of the rest of the degrees there prohibited."

Lord Coke neither expresses any opinion that the law then was in accordance with the decision in *Alice Stircheley's Case*, nor that the Declaratory Act of 28 Hen. VIII. c. 7, was then in force, but treats the rule given by 32 Hen. VIII. c. 38, as that which settled the law. The concluding paragraph of the chapter warrants an inference that Lord Coke did not consider that marriage after fornication with kin of the wife was contrary to God's law, unless it could be considered to be within the Levitical degrees. It is in these words:—"There "be also other divorces which declare the marriage to be void, "as a divorce *causâ frigiditatis*, where the party hath *perpe-*

[1] In the margin of "an exposition," Second Instit. p. 683, edit. 1797, are the words,—"See those degrees truly set down in the statute 25 Hen. VIII. c. 22 and 28 Hen. VIII. c. 7."

1861.

April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

"*tuam impotentiam generationis*, and *causâ metus, sive duritiæ*, "also *causâ impubertatis*. These marriages are said to be pro- "hibited by God's law, otherwise the statute of 32 Hen. VIII. "would extend unto them;" and here he does not include in his enumeration such cases as that now before the Court.

This statute was repealed as to precontracts by the 2 & 3 Edw. VI. c. 23, but in all other respects confirmed. By the 1 Mary, sess. 2, c. 1, the 25 Hen. VIII. c. 22, was again repealed, together with so much of 28 Hen. VIII. c. 7, as affected the Queen's legitimacy. By the 1 & 2 Phil. & M. c. 8, the whole of the statute 28 Hen. VIII. c. 16, and all that part of the statute 28 Hen. VIII. c. 7, that concerneth a prohibition to marry within the degrees expressed in the said Act, and the 32 Hen. VIII. c. 38, were repealed. The statute 1 Eliz. c. 1, repealed the statute 1 & 2 Phil. & M. c. 8, and that of itself would have revived all statutes repealed by the latter, but it proceeds in express terms to revive certain statutes; and amongst others the statute 23 Hen. VIII. c. 16, and so much of the 32 Hen. VIII. c. 38, as was not repealed by the statute 2 & 3 Edw. VI. c. 23. Section 13 then follows in these terms:—"Be it further enacted, that all "other laws and statutes and the branches and clauses of any "Act or statute repealed and made void by the said Act of "Repeal, made in the time of the said King Philip and Queen "Mary, and not in this present Act specially mentioned and "revived, shall stand and remain and be repealed and void in "such like manner and form as they were before the making "of this Act, anything herein contained to the contrary not- "withstanding."

In *Hill* v. *Good*, Vaughan, 325, Vaughan, C.J., gave it as his opinion that notwithstanding this clause, the 28 Hen. VIII. c. 7, was revived by the revival of the 28 Hen. VIII. c. 16, although not specially mentioned, because the latter statute made void all marriages declared to be so by the 28 Hen. VIII. c. 7. But I do not find in 28 Hen. VIII. c. 16, any such en-

1861. April 22 and 23 and June 3. WING v. TAYLOR (falsely calling herself WING).

actment. It saves from all question marriages solemnized before a certain day, and not prohibited by the 28 Hen. VIII. c. 7, but does not declare any to be void. Vaughan, C.J., further expresses an opinion that sections 9 and 10 of the 28 Hen. VIII. c. 7, were not repealed by the 1 & 2 Phil. & M. c. 8; but in Gibson's Codex, 496, that opinion is controverted, and we think with success.

Again, in Com. Dig. Parl. (R. 9 *a*), there is this passage: "So an Act which repeals a statute by which another was "repealed will be a revivor of the statute which was re- "pealed. So though the words are that no statute not ex- "pressly mentioned shall be revived, if thereby another "statute is revived which mentions it to be in force, as the "statute 21 Hen. VIII. c. 13, of pluralities, being mentioned "to be in force by the statute 25 Hen. VIII. c. 21, which "was revived by the statute of 1 Eliz. c. 1, though it says "that no statute repealed by the 1 & 2 Phil. & Mary, c. 2, "shall be in force if it be not specially revived." If the learned author of that Digest had considered that the statute 28 Hen. VIII. s. 3, c. 7, was also revived in the same manner by the statute of 1 Eliz. c. 1, by the revival of the 28 Hen. VIII. c. 16, he would probably have mentioned it. Moreover the statute 28 Hen. VIII. c. 16, refers to the statute of the same session, merely for the purpose of explaining what marriages are to be protected against all impeachment; but the statute 25 Hen. VIII. c. 21, has this clause respecting the prior statute 21 Hen. VIII. c. 13:—"Provided also, that this pre- "sent Act, or anything therein contained, or any license or "dispensation hereafter to be made by virtue or authority "thereof, shall not extend to the repeal or derogation of the "late Act 21 Hen. VIII. c. 13, made the beginning of this "present Parliament for reformation of pluralities of benefices, "and for non-residences of spiritual persons upon their digni- "ties or benefices, nor to anything contained or mentioned "in the said Act, nor that this Act nor anything to be done

"by authority thereof, shall not be taken, expounded, or in-
"terpreted to give license to any person or persons to have
"any more number of benefices than is limited in the said
"Act, and that the same Act for pluralities and non-resi-
"dences of benefices, and everything therein contained, shall
"stand good and effectual in all intents, according to the true
"meaning thereof, anything in this present Act, or any license
"or dispensation to be had by authority thereof, to the con-
"trary notwithstanding." And this statute, together with some others, is revived by the 1 Eliz. c. 1, in these terms, that the Act specified, "and all and every branches, words, and sen-
"tences in the said several Acts and statutes contained by the
"authority of this present Parliament, from and at all times
"after the last day of this session of Parliament, shall be re-
"vived and stand and be in full force and strength to all in-
"tents, constructions, and purposes." By these words the whole statute was revived, and the 21st section was restored to full force, and that provided that the 21 Hen. VIII. c. 13, should stand good and effectual to all intents. The 28 Hen. VIII. c. 16, contains no such enactment with reference to the statute 28 Hen. VIII. c. 7. Again if the statute of 28 Hen. VIII. c. 7, is revived, there is nothing to limit that revival to any particular part; but it is impossible to suppose that it was intended to revive the whole, for it made it treason to say that the marriage of Hen. VIII. with the Lady Anne was valid, or that the Lady Elizabeth was legitimate.

This examination of the statutes has led us to the conclu-clusion that the 28 Hen. VIII. c. 7, was repealed and has not been revived, and that the 32 Hen. VIII. c. 38, gives the rule by which we are to judge whether parties may lawfully marry or not; and that rule is,—"That all persons be lawful that be
"not prohibited by God's law to marry; and that no reserva-
"tion or prohibition, God's law except, shall trouble or im-
"peach any marriage without the Levitical degrees." The prohibitions described in the 18th chapter of Leviticus seem

1861. April 22 and 23 and June 3.

WING v. TAYLOR (falsely calling herself WING).

to us to assume that marriage is necessary to create the degree of affinity which makes a subsequent marriage unlawful on the ground of affinity; and Lord Coke, in his commentary on this statute, 32 Hen. VIII. c. 38, sets out a table of the prohibited degrees, and according to that table marriage is necessary to create the affinity which causes a second marriage to be prohibited. If the marriage in question is not within the Levitical degrees, is it otherwise contrary to God's law? No trace of any decision to that effect is to be found in our law-books, except the old record of *Alice Stircheley's Case* in the reign of Edward I., when "many divorces were in force "by the canon law which were not in force when Lord Coke "wrote."

In *Mrs. Addison's Case*, M'Queen's Practice of the House of Lords, 477, 594, Lord Thurlow, in supporting the bill for divorce, relied on the principle that by the affinity incident to the husband's criminal conversation with his wife's sister, he was in like manner barred intercourse with her relatives standing within the forbidden degrees of that affinity; but he did not support the proposition by any reference to statutes or decisions. Lords Eldon and Rosslyn said that Lord Thurlow had placed the case in a new light, and voted for the bill without expressly assenting to or dissenting from what Lord Thurlow had said; that case therefore can hardly be considered as an authority on the subject.

If the statute 28 Hen. VIII. c. 7, had been considered to be revived, or if the statute 32 Hen. VIII. c. 38, had been capable of receiving the construction now contended for, it can hardly be doubted that some suits for nullity of marriage on such a ground would have been instituted long ago. The absence of any such case is in our judgment strong evidence of what has been the general opinion as to the state of the law on that subject, and we think that opinion sound. But even supposing the question to be doubtful, we should not think ourselves justified in putting for the first time upon

a statute passed above three centuries ago, such a construction as would expose marriages to the peril of impeachment upon allegations the falsehood of which it would be difficult to prove, and so render uncertain the *status* of many persons supposing themselves to have been lawfully married, and rendering the issue of such marriages liable to be bastardized upon an objection which at the time of marriage might be wholly unknown to either of the parents.

1861.
April 22 and 23 and June 3.
WING v. TAYLOR (falsely calling herself WING).

Demurrer allowed.

(*Before the* JUDGE ORDINARY, *on Motion.*)

April 24.

LATHAM *v.* LATHAM AND GETHIN.

LATHAM v. LATHAM AND GETHIN.

Decree Nisi *for Dissolution.—Alimony* pedente lite.—*To what period due.*

A decree *nisi* for dissolution of marriage, if not appealed from, puts an end to the *lis* between the parties. Alimony *pendente lite* will not therefore be due after the date of the decree *nisi*; but where the husband moved to have the decree made absolute, he being resident in India, and it appeared that a sum of money was due to the wife on account of alimony *pendente lite*, the Court refused to make the decree absolute.

In this case a decree *nisi* for dissolution of marriage at the petition of the husband had been made, and the three months having elapsed,

Mr. Robert Pritchard now moved the Court on the usual affidavits to make the decree absolute.

Dr. Swabey: In this case a decree for almony *pendente lite* was made, and a certain amount is now due. Mr. Latham

1861. April 24.

LATHAM v. LATHAM AND GETHIN.

has been resident in India for some time, and there is no prospect of his return; if the Court makes the decree absolute, the woman will be without remedy for what is due to her under the order of the Court. This application does not depend upon the power of showing cause against the decree *nisi* given by the 23 & 24 Vict. c. 144, s. 7, but upon the fact, that Mr. Latham is asking for a decree of dissolution, without having obeyed an order of the Court, made in the progress of the suit.

JUDGE ORDINARY: I think what is due, under the order for alimony *pendente lite*, must be paid before the decree is made absolute. There may be a question as to the period up to which it is due. As I am of opinion that the respondent cannot, under the 23 & 24 Vict. c. 144, s. 7, show cause against making a decree *nisi* absolute, in other words, that the *lis* between the parties is at an end when the decree *nisi* is made, it follows that the alimony, being in terms *pendente lite*, must cease when the decree *nisi* is made. Up to that date it should be paid, and I shall not make the decree in this case absolute at present.

1861.
May 1 and 8.

JESSOP
v.
JESSOP.

(*Before the* JUDGE ORDINARY, *on Motion.*)

JESSOP *v.* JESSOP.

Petition for Dissolution at suit of Wife.—Negative Answer of Husband.—Intervention of Queen's Proctor.—Plea of Collusion.—Practice.

Where the Queen's Proctor obtains the leave of the Court to intervene, and pleads collusion between the petitioner and respondent, such plea is a good plea; but the petitioner is entitled to be acquainted with the character of the collusion intended to be charged, by way of specification or particulars.

Dr. Phillimore, Q.C., moved the Court under the following circumstances:—This is a petition by the wife for dissolution of marriage, on the ground of the husband's adultery, cruelty, and desertion. The husband appeared and filed an answer, denying these charges; and the Court directed the cause to be heard by oral evidence; it stands No. 117 in the present printed list. The Queen's Proctor has obtained the leave of the Court to intervene under the direction of the Attorney-General. The 23 & 24 Vict. c. 144, s. 7, directs that "at any "time during the progress of the cause, or before the decree "is made absolute, any person may give information to her "Majesty's Proctor of any matter material to the due decision "of the case, who may thereupon take such steps as the "Attorney-General may deem necessary or expedient; and if, "from any such information or otherwise, the said Proctor "shall suspect that any parties to the suit are or have been "acting in collusion for the purpose of obtaining a divorce "contrary to the justice of the case, he may, under the direc- "tion of the Attorney-General, and by leave of the Court, "intervene in the suit, *alleging such case of collusion*, and "retain counsel and *subpœna* witnesses to prove it." In the present case the plea of the Queen's Proctor is simply that the petitioner and respondent are acting in collusion.

1861. May 1 and 8. JESSOP v. JESSOP.

My motion on behalf of the petitioner is, that the plea be amended by stating the nature of the case. The words of the section seem to contemplate some particulars; and, considering the wide powers given to the Queen's Proctor, it may be necessary, in order that the Act should not become oppressive and unjust to suitors, that some such rule should be observed.

The Attorney-General (Sir R. Bethell) *contrà:* If I am called upon to define the facts which I am about to prove, I should rely upon the ordinary rule that evidence ought not to be pleaded; but, looking at the object of the statute, it would probably be defeated if the motion were to be complied with. As to injustice to suitors, it is submitted that the ordinary rules of proceeding, as between party and party, do not apply when the Legislature has entrusted certain powers to the Queen's Proctor, a public officer, to be exercised for the public interest, and not at his own discretion merely, but under the direction of the Attorney-General, and with the permission of this Court.

BY THE COURT: The latter can hardly be considered an additional safeguard; for in accordance with the practice of other courts in analogous matters, I should certainly hold it sufficient if the authority of the Attorney-General were alleged, and should give leave as a matter of course.

May 8. *Dr. Phillimore* in reply.

THE JUDGE ORDINARY: With reference to amending the plea, by stating evidence or the facts on which the collusion is supposed to be founded, it is quite out of question. As to oppression, I think the Legislature has guarded against that by putting it in the hands of a public officer. My difficulty is this: collusion is not, like condonation, a well understood term; it may be by keeping back evidence of what

would be a good answer, or by agreeing to set up a false case. I am in doubt whether the nature of the collusion ought not to be stated in general terms. I will take time to consider, for it is a matter of some importance.

1861. May 1 and 8.

JESSOP v. JESSOP.

Cur. adv. vult.

THE JUDGE ORDINARY: In this case I think it is by no means necessary to state the facts that are intended to be proved; but the character of the collusion pleaded should be given as by way of particulars; whether, for instance, it is meant that a sham case has been set up, or that the parties are acting in concert to prove a real one. I reject the application to amend the plea; the petitioner can then come before me on summons, and ask for specification.

May 8.

(*Before the* JUDGE ORDINARY, *on Demurrer.*)

May 15.

BURROUGHS *v.* BURROUGHS.

BURROUGHS v. BURROUGHS.

Wife's Suit for Restitution.—Plea, reasonable suspicion of Adultery.—Demurrer.

Nothing can be pleaded in bar to a petition for restitution of conjugal rights but what would entitle the respondent to a sentence of judicial separation.

This was a question arising on a plea in answer to a suit for restitution of conjugal rights, brought by the wife. The husband's answer alleged a reasonable cause of separation, "by reason, "first, that the said A. M. F. B. has given the respondent just "cause for a strong and reasonable suspicion that she has been "guilty of adultery, inasmuch as she has, on divers occasions "throughout the year 1860, against the wish and in spite of "the remonstrance of the respondent, clandestinely taken

1861. May 15.

BURROUGHS v. BURROUGHS.

"walks with, and received visits from a person named B. S., "at her own house at S., in the county of ——, notwithstand- "ing that she well knew that by reason of scandalous reports "respecting her and the said B. S., the respondent had for- "bidden him to enter his house, or to speak to the said "A. M. F. B."

The answer contained other pleas, alleging acts of adultery, and prayed to reject the prayer of the petitioner, and further to decree that the respondent may be judicially separated from the said petitioner.

Demurrer to the first plea, on the ground that a strong and reasonable suspicion of guilt of adultery is no bar to the decree of restitution of conjugal rights prayed in the petition.

Joinder in demurrer.

Dr. Swabey in support of demurrer: It will hardly be contended that a suspicion of adultery is sufficient to found a decree of judicial separation; but the prayer of the answer is twofold, and it will be said that the plea is sufficient to support the first branch of the prayer, namely, to dismiss the petition, though not ground for the further decree. It is submitted however that the real principle is, that nothing can be pleaded in bar to a suit for restitution but what would entitle the respondent to a judicial separation, or under the old system to a divorce *à mensâ et thoro;* for in such suits as these the 22nd section of the Divorce Act requires the Court to act as far as may be on the principles of the Ecclesiastical Courts. The principle was clearly established in the last century, *Baber* v. *Baber,* MS. note, Arches, A.D. 1727:—"B. calls "her husband in a cause of restitution of conjugal rights; the "husband refused to take her home, and offered an allegation "wherein, among other things, frowardness of temper, etc., "he pleaded an elopement and discreditable way of living, and "that they had for some time lived separately by agreement; "that she had run very much in debt, which, if he took her

"home again, he would be obliged to pay. The Chancellor "of London rejected this allegation, and the Dean of the "same opinion, because no act was laid for which the Court "could separate." To the same effect is the case of *Holmes* v. *Holmes*, 2 Lee, 116, in which Sir George Lee's sentence was confirmed, on appeal, by the delegates. All cases since that date in which the principle has been discussed or referred to, when examined, show that it has never been departed from in the final decision of any suit. In some cases, as in *Mortimer* v. *Mortimer*, 2 Consist. 310, the remarks of the learned judges may be explained by reference to the rules of evidence in those courts, by which they were forbid to pronounce a sentence on the uncorroborated evidence of a single witness (see *Evans* v. *Evans*, 3 N.C. 416), or to act on the uncorroborated confession of a defendant, however clear and undoubted (1 Card. Syn. 224, 307); in other words, judges have intimated that they might take into consideration an answer proved by such evidence, though the rule of law would hinder their acting on the allegations of a plaintiff so proved; but they have never said that the facts admissible in answer might be other than those on which, if proved by legal evidence, a positive sentence might have been founded. The admission of the allegation in *Molony* v. *Molony*, 2 Add. 249, led to no decision on the point of law. *Westmeath* v. *Westmeath*, 2 Hagg. 57, Sup.; *Dysart* v. *Dysart*, 3 N.C. 369; *Simmons* v. *Simmons*, 5 N.C. 330; *Moore* v. *Moore*, 3 Moore's P. C., were also cited.

It cannot be said that the legal principle is altered, because its application is enlarged by the fact that desertion for two years and upwards is by the statute a new ground for judicial separation, and as such might, it is presumed, be pleaded in bar to a suit for restitution. If the Court however feels that it has a discretion in the matter, it will consider the effect of putting an issue on such a plea before a jury, and the uncertainty it would introduce into the whole law relating to the matter.

1861. May 30.

Cox v. Cox.

King Street, Sydney, on the 23rd of December, 1859, but that on the 10th of January, 1860, an appearance was entered for the respondent by Messrs. Pawle, Belfrage, and Asprey, of 7, New Inn, Strand, a date at which thay did not and could not know that the citation had been served; that on the 10th of January, 1860, Charles Birch Crisp, who was then a clerk of the said Messrs. Pawle and Co., and acting as such at their office in New Inn, made an affidavit describing himself as of his private residence, and giving the addition of gentleman, to found an order for the examination, on behalf of the petitioner, of a necessary witness, who was then staying in Aldersgate Street, and was about to leave for Melbourne; that an order was obtained on the said affidavit, and the witness examined by Mr. Bushby for the petitioner, and cross-examined by Mr. Belfrage of the said firm on behalf of the respondent; that Charles Birch Crisp had almost throughout the suit conducted the proceedings on behalf of the petitioners, by attendances in the registry to obtain information as to the course of proceedings, and to file papers on behalf of the petitioner, he being all that time clerk of the respondent's attorneys; that Horatio Nelson Powell left this country in the autumn of 1860 for Australia.

In support of the decree *nisi* being made absolute, affidavits had been filed by Mrs. Cox, Mr. Pawle, Mr. Crisp, and Mr. Lovesy.

From these affidavits it appeared that Mr. Pawle had acted as the solicitor of Mr. Cox before he left England, and was intimate with both parties; that by his advice Mrs. Cox accompanied her husband to Australia in spite of previous misconduct on his part; that in May, 1857, in Australia, she obtained counsel's opinion at Melbourne with respect to the petition, and in consequence of that left for England, previously giving her husband notice in writing (as advised by counsel) of her intention of petitioning; that on her arrival in England she went to Mr. Pawle, who advised her to em-

ploy Mr. Powell, of Gray's Inn; that Mr. Pawle received a letter from Cox in October, 1859, authorizing him to appear to the petition, but not instructing him to oppose it (this accounted for the appearance being entered before it could be known that the citation was served); that Powell was a friend of Mr. Pawle's, new to London practice, and was in the habit of consulting Mr. Crisp, the latter's managing clerk, in the conduct of his business; that on Powell leaving the country for Australia, his business and all his papers were transferred to Messrs. Pawle and Co., who directed Crisp to place the petitioner's papers in the hands of Mr. Lovesy, who had not thought it necessary, as the case was ready for hearing when transferred to him, to alter the solicitor's name on the record.

On this state of facts, *Mr. Phipson* submitted that there was abundant ground for the intervention of the Queen's Proctor, and left the matter in the hands of the Court.

Dr. Deane, Q.C. (*Mr. Bushby* with him), for the petitioner.

Dr. Phillimore, Q.C., for the respondent.

By the Court: I have already intimated that it is not a case of collusion, and I am not sure what right you have to be heard.

Dr. Phillimore: As to costs, I apprehend. Under 23 & 24 Vict. c. 144, s. 7, the Court has the power to order the costs of the Queen's Proctor's intervention to be paid by the parties, or such of them as it shall see fit; and by the 15th rule (the 11th of January, 1860), a respondent having entered an appearance may be heard in respect, among other things, of any questions as to costs of suit.

1861. May 30.

Cox v. Cox.

THE JUDGE ORDINARY: I am not all surprised that the Attorney-General intervened; the mode in which the suit was conducted was likely to excite suspicion. I think the attorney's clerk was not justified in describing himself as he did in the affidavit; because no doubt the object was to conceal from the Court and its officers that he was acting on both sides. There seems, however, no ground of complaint against Mrs. Cox, and I do not think that Mr. Cox has acted irregularly in the matter. There is no ground for condemning him in the costs of the intervention. The Queen's Proctor's costs will therefore be costs of his office, and I make the decree for dissolution absolute.

June 4 and 7.

MILLS v. MILLS. POLLACK v. POLLACK AND DEANE AND M'NAMARA.

(*Before the* JUDGE ORDINARY.)

MILLS *v.* MILLS.

POLLACK *v.* POLLACK AND DEANE AND M'NAMARA.

Evidence of Witnesses resident abroad taken under Commission.—Proof of Absence from Jurisdiction.—Practice.

Proof to satisfy the Court that a witness whose evidence has been taken abroad under a commission is out of the jurisdiction when the evidence is tendered, may be less stringent when the witness is resident abroad, than when the evidence has been taken of a witness going out of the jurisdiction for a temporary purpose; and where the affidavit to found the order for the commission had stated that the object was to examine A. B. resident abroad, and the summons was served on the co-respondents, the Court

HELD, that the presumption was that the witness continued abroad, unless the contrary were shown, and allowed the evidence to be used.

Dr. Phillimore, Q.C., and *Mr. Mundell*, for Mrs. Mills, the petitioner, the husband not appearing, tendered evidence of

witnesses taken under commission. The 20 & 21 Vict. c. 85, s. 47, gives the Divorce Court the same power in respect of issuing commissions, etc., for examination of witnesses as the statutes 13 Geo. III. c. 63, and 1 Will. IV. c. 22, give the courts of common law. By sect. 10 of the latter Act no examination or deposition to be taken by virtue of this Act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial.

1861. June 4 and 7.

MILLS v. MILLS. POLLACK v. POLLACK AND DEANE AND M'NAMARA.

THE JUDGE ORDINARY: I have always understood the practice to be, that when the evidence of persons permanently residing abroad has been taken under commission, but slight proof of their continuance abroad is required. The presumption rather is, that their residence abroad continues. It is different when a person about to go abroad for a temporary purpose is examined under commission or on account of illness. Then clear proof of the absence from the jurisdiction or of the continuance of the illness is required.

Dr. Swabey for the petitioner Mr. Pollack.

Mr. Merewether and *Mr. O'Dowd* for the co-respondent Deane.

Counsel for the petitioner tendered evidence of a witness taken under commission at Königsberg, in Prussia, and called a clerk of solicitor for petitioner, who produced a letter received by post with the Königsberg post-mark, and some date in May, 1861, purporting to be written to the solicitor by the witness. The clerk said he had inspected the signature of the witness to the deposition, and it appeared to be the same.

1861.

June 4 and 7.

MILLS
v.
MILLS.
POLLACK
v.
POLLACK AND
DEANE AND
M'NAMARA.

THE JUDGE ORDINARY: He does not know the handwriting. It carries the matter no further. Parties should come better prepared on such points. I have been looking at the papers filed in this case, and I find that the affidavit on which the order for a commission was made states that the object of the commission was to examine a witness resident abroad, and the summons to attend on the application for the commission was served on the solicitors for both co-respondents. As they did not deny that the witness was then resident abroad, I must take it that she was so resident, and the presumption is, that she remains abroad till the contrary is shown. I think this is sufficient to let in the evidence.

CASES

IN THE

COURT OF PROBATE.

JOHNSON *v.* WELDY.

1861.
April 24.
JOHNSON
v.
WELDY.

Practice.—Affidavit of service on a minor.—Guardian.

An affidavit that a minor was served with a citation in the presence of A., his guardian, should go on to show how A. became his guardian.

Dr. Spinks moved that administration of the effects of —— Weldy, deceased, should be granted to a creditor. The deceased died intestate, leaving a widow and one son, a minor. The widow had been personally served, and so had the son, W. H. Weldy, in the presence of Ann Hyde, his guardian. No appearance had been entered.

SIR C. CRESSWELL: The affidavit of service is insufficient: it states that the minor was served with the citation in the presence of Ann Hyde, his guardian; but it does not show how she became his guardian. It must be amended so as to show to the satisfaction of the Registrar how she became guardian. When that has been done the grant may issue.

1861.
April 24 and 27.

In the Goods of HENRY HART COLEMAN.

In the Goods of HENRY HART COLEMAN (deceased).

Probate.—Erasure.

Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and attested, and that subsequently the attesting witness's name had been erased by the testator, and had at his request been re-written by the attesting witness, the Court, on motion, granted probate to the widow on affidavit that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children.

Henry Hart Coleman died, leaving a will, dated the 17th of August, 1854, whereof he appointed his wife sole executrix.

The two attesting witnesses proved the due execution of the will; part of the signature and address of one of the attesting witnesses appeared to have been written on an erasure; that witness, who, with the other, deposed to the due execution of the will, stated that he was accustomed to wear spectacles, but that he was without them when he attested the will; that a day or two afterwards he saw the testator, who told him that he had written his name and address very badly, and that he was ashamed of it; that the testator then scratched out part of his name and address, and told him to re-write it, and that he accordingly did so in the testator's presence.

Dr. Spinks now moved that probate of the will should be granted to the widow of the deceased. The will having been duly executed, is not invalidated by what was subsequently done: (*Playne* v. *Scriven*, 7 N.C. 122.) In that case the will was duly executed, but the name of one of the subscribed witnesses, a legatee under the will, was afterwards struck out to preserve her legacy; and a second, but imperfect, execution then took place. The will was held good on the first execution, as the subsequent erasure was without intention to revoke.

1861.
April 24 and 27.

In the Goods of HENRY HART COLEMAN.

SIR C. CRESSWELL: I doubt whether I ought not to give the next of kin and parties entitled in distribution an opportunity of contesting the will, if they think fit. In *Playne* v. *Scriven* the name of the attesting witness was struck through, but remained visible. In this case the testator erased it. If the signature had been cut off or the will burnt, it would have operated as a revocation. I think I ought not to grant probate, unless the persons who would be entitled in case of an intestacy have notice of the application.

Dr. Spinks: The widow who applies for probate and her infant children are the only persons entitled in distribution.

SIR C. CRESSWELL: I must have an affidavit of that before I grant probate.

April 27.

Dr. Spinks renewed the motion on an affidavit that the widow and her two infant children were the only persons entitled in distribution, and that notice of the motion had been given to the next of kin (the two children).

SIR C. CRESSWELL granted probate.

July 11.

In the Goods of SOLOMON MENDES DA SILVA.

In the Goods of Solomon Mendes Da Silva (deceased).

Probate.—Conditional Codicil.

A codicil expressed to take effect only upon an event which does not happen, republishes a will to which it refers by date, and is on that ground entitled to probate.

The deceased in this case died, leaving a will bearing date the 18th of May, 1861, and a codicil dated the 23rd of May, 1861, expressed as follows:—"This is a codicil to the last will "and testament of me, Solomon Mendes da Silva, formerly of

1861. July 11.

In the Goods of SOLOMON MENDES DA SILVA.

"Jamaica, but now of Cheltenham, in the county of Glou-"cester, which will bears date May 18, 1861: Now I make "this codicil to take effect only in case I survive my dear wife, "Sarah Mendes da Silva, but not otherwise; therefore, in case "I survive my dear wife, I give and bequeath," etc. The deceased died in the lifetime of his wife.

Dr. Spinks now moved for probate of the will and codicil to be granted to the executors named in the will. In the Registry the objection had been made that probate of the codicil could not be granted, as it was contingent upon the deceased surviving his wife, an event which had not happened.

SIR C. CRESSWELL: I think that the executors are entitled to probate of the codicil, as well as of the will; for although the codicil is conditional, it would, I imagine, have the effect of republishing the will, or of making the will valid, if it had not been duly executed.

I think, therefore, that probate should be granted.

Probate granted.

(NOTE.—But see *Lord Hardwicke's remarks in Parsons* v. *Lanoe*, 1 *Ves., sen.*, 190.)

July 24.

In the Goods of HUGH STACPOOLE (deceased).

In the Goods of HUGH STACPOOLE.

Administration Bond.—Amount of Penalty.—20 *and* 21 *Vict. c.* 77, *s.* 82.

Where letters of administration were granted merely to enable a personal representative of the deceased to execute a formal release to the trustee under a marriage-settlement, the Court allowed the property to be sworn under £20.

Hugh Stacpoole died in 1840. Upon his marriage a set-

1861.
July 24.

In the Goods of HUGH STACPOOLE.

tlement was made of two sums of £10,411. 4*s.* 2*d.*, and £1,400, the interest to be paid to his wife for life, and at her death the principal to be divided among the children of the marriage, and in default of children to go to such persons as the husband should by deed or will appoint. There were no children of the marriage. Hugh Stacpoole made his will in 1838, leaving various legacies of his own property, and appointing the trust property to a great many parties. He appointed William Henry Stacpoole, George Westropp, and Michael Stacpoole, his executors. They proved the will, paid the debts, and distributed all the property. They then died at various intervals, each leaving a will, which was proved in Ireland but not in England, their respective representatives being Emma Westropp, Jane Stacpoole, and Charlotte Harrison (formerly Charlotte Stacpoole).

The testator's widow died in 1859, and the surviving trustee under the settlement was willing to distribute the moneys standing in his name among the numerous appointees under the will; but was advised he could not do so safely without having a discharge from the representative of the testator.

Mr. Geary moved for letters of administration with the will annexed of the unadministered property of the deceased to be granted to Octavius O'Brian, an assignee of one of the appointees under the will, for the purpose of giving the trustee such discharge; and as the representative so appointed would not touch the money, he moved under the 82nd section of the Act, that the Court would direct the administration bond to be for a nominal sum, citing *Re Gent*, 1 Swab. & Trist. 54.

SIR C. CRESSWELL: I think the property may be sworn at a nominal sum. The interest of the personal representative, as he will not touch the money, is surely nominal. Let him swear that the property to be administered is under £20, and that will obviate any difficulty.

1861.
April 24.

CUBBON
v.
STEELE AND ANOTHER.
In the Goods of CHARLES WHISTON.

In the Goods of CHARLES WHISTON (deceased).

Administration.—Practice.—Isle of Man grant.

In the Isle of Man, officers called "Sumners" are appointed in each parish by the Bishop of the diocese, whose duty it is (*inter alia*) to take upon themselves grants of administration, with the wills annexed, in the event of executors refusing to act, or being unable to give security to the Ecclesiastical Court of the diocese.

A. died in the Isle of Man, leaving a will, whereof he appointed executors. The executors being unable to give security to the Ecclesiastical Court of the diocese, administration with the will annexed was then granted to B., Sumner for the parish in which A. died.

The executors having been cited and not appearing, the Court, upon an affidavit as to the circumstances under which the grant was made to B., and upon B.'s consent being filed in the Registry, granted administration with the will annexed to the residuary legatee.

Charles Whiston, late of Douglas, in the Isle of Man, died on the 26th of March, 1860, leaving a will, bearing date the 4th of March, 1860, whereof he appointed John Steele and Edward Cain (the defendants) executors, and Sarah Cubbon (the plaintiff) residuary legatee. On the 20th of April, 1860, letters of administration, with the will annexed, were granted by the Archidiaconal Court of the Isle, and diocese of Sodor and Man, to John Moore, Sumner of the deceased's parish, the executors not being prepared with pledges as required by the said Court. An official copy of the said letters of administration, under the hand and seal of the Archdeacon of the Isle of Man and diocese of Sodor and Man, had been brought into the Registry. A citation had been issued by Sarah Cubbon, and served upon the executors, calling upon them to accept or refuse probate, or show cause why letters of administration, with the will annexed, should not be granted to her. The executors had not appeared.

Dr. Spinks moved that letters of administration, with the said will annexed, of the personal estate and effects of the said

deceased should be granted to Sarah Cubbon, as residuary legatee. 1861. April 24.

CUBBON v. STEELE AND ANOTHER. In the Goods of CHARLES WHISTON.

SIR C. CRESSWELL directed that the motion should stand over in order that some explanation should be given as to the rights of the person to whom the Isle of Man grant was made, and that notice of the application by Sarah Cubbon should be given him.

Dr. Spinks now renewed the motion upon an affidavit of Samuel Harris, as to the rights of John Moore, under the Isle of Man grant, and upon John Moore's consent, that the grant should be made to Sarah Cubbon, having been filed in the Registry. The affidavit of Samuel Harris stated that he was Sumner-General for the diocese of Sodor and Man, and that he was appointed by the Bishop of the diocese; that he had a Sumner in every parish in the island, who acted as his deputies in their respective parishes, and that John Moore was his deputy for the parish of Braddon, in which parish the town of Douglas is situate; that it was his duty and the duty of the deputies to take upon themselves all disputed grants of administration of descendants estates in the island, and also of administrations with the wills annexed, in the event of executors refusing to act, or neglecting or being unable to give security to the Ecclesiastical Court of the Diocese, or until the next of kin or parties beneficially interested in descendants' estates came forward to take out administration or take probate; that the executors named in the will of the said C. Whiston, deceased, not being prepared with pledges as required by the Ecclesiastical Court, administration with the will annexed was, at an Ecclesiastical Court holden in Douglas, granted to John Moore, in his capacity of Sumner of Braddon. July 24.

SIR C. CRESSWELL granted the motion.

Motion granted.

1861.
Nov. 6 & 7 and Dec. 8.

STAINES v. STEWART AND JONES.

STAINES *v.* STEWART AND JONES.

Before SIR C. CRESSWELL, *without a Jury.*

Revocation of Will.—Evidence of Declarations of Deceased after alleged Act of Revocation.—Death of Plaintiff after Cause heard and before Judgment.—Practice.

Direct evidence of an act of revocation by the testator. Moral character of the witnesses. Inconsistency and improbability of their story. Defecit probatio.

On an issue as to the revocation of a duly executed will, evidence of declarations of the deceased (to the effect that he had made a will, but had destroyed it) subsequent to the date of the alleged revocation, was held to be inadmissible, as falling within the principle laid down in *Doe* v. *Palmer*, 16 Q. B. 747.

The plaintiff dying after the case had been argued before the Court but before judgment, the Court suspended its judgment till a personal representative of the plaintiff made himself a party to the record.

This was a question as to the revocation of a will which was admitted to have been duly executed by M. W. Staines, the father of the plaintiff, on the 7th of October, 1858. The plaintiff, the only child of the deceased, had cited Messrs. Stewart and Jones, the executors named in the will, to propound the paper writing brought into the registry, and alleged by the plaintiff to have been revoked by the deceased, if they should think fit so to do. The case was heard before Sir C. Creswell without a jury.

Dr. Deane, Q.C., *Dr. Spinks* and *Mr. Macnamara* for the plaintiff.

Dr. Phillimore, Q.C., and *Dr. Swabey* for the defendants.

Evidence was given, as more fully stated in the judgment, of the cutting and tearing of the will by the deceased in August, 1860. In the following November he was in lodgings in Bristol, where he died under an assumed name on the

16th of December, 1860. The lodging-house-keeper was produced as a witness on behalf of the plaintiff, and deposed that in a conversation which she had with deceased, the latter had stated that he had made a will, but had destroyed it.

Dr. Phillimore objected that this evidence of declarations of the deceased after the date of the alleged revocation was inadmissible. He relied on the principle laid down in *Doe dem. Shallcross* v. *Palmer*, 16 Q. B. 747, as applicable to the circumstances of the present case. On the whole case, he contended that the character of witnesses who deposed to the act of revocation, the inconsistencies of other points of their evidence with the facts of the case, and the improbability of their story, were such that the Court could not safely act on their uncorroborated testimony.

Dr. Deane, contrà.

Cur. adv. vult. as to the admissibility of this evidence and the whole case.

The evidence of Mr. Stewart, referred to in the judgment, was in substance as follows:—"I am one of the firm of Lan-"fear and Stewart, solicitors, of 11, Abchurch-lane. I had "known the deceased for some years. I was first profes-"sionally engaged for him in 1858; in that year his affairs "were in considerable embarrassment. I was able to put them "on a much better footing for him, and he expressed himself "under obligations to me on that score. At that time he "first told me of his son, the present plaintiff, who, he said, "was leading a most extravagant and disreputable life, and he "asked my advice as to the best mode of securing a provision "for him. I advised an annuity deed, which was ultimately "executed in April, 1859. In September, 1858, the deceased "called at my office, and gave instructions for a will." [The instructions (produced in writing) gave all real and personal

1861. Nov. 6 & 7 and Dec. 3.

STAINES v. STEWART AND JONES.

estate to trustees, the income to be paid to the plaintiff by half-yearly payments, without power of anticipation. After his death, four legacies of £100, and the residue to two sons of Mr. Stewart. Mr. Stewart and the Rev. J. Jones, executors and trustees.] "The deceased wished that I should "be residuary legatee. On those terms I refused to make "the will. He then said there could be no objection to mak- "ing my sons residuary legatees. A draft will was prepared "from these instructions, which was for some time in de- "ceased's possession. He returned it with a letter. It was then "engrossed and executed at my office on the 7th of October, "1858, and remained in our possession till sent, by deceased's "desire, to his address in Birchin-lane, on the 4th of April, "1860. On the 18th of April he acknowledged the receipt of "it. This was the last that I heard of or from him till served "with the citation in this suit on the 3rd of May, 1861."

Various letters from the deceased to Messrs. Stewart and Lanfear, commencing the 23rd of August, 1858, down to the 18th of April, 1860, in which last he acknowledged the receipt of the will, were put in; they entirely corroborated Mr. Stewart's account of the will, of his connection with the deceased, and of the view which the latter took of his son's conduct. The letter of the 2nd of April, 1860, was in the following terms:—

"4, Birchin-lane, 2nd April, 1860.

"(Care of the Housekeeper.)

"Gentlemen,—Not having had any affairs to communicate "to you during the last few months, of course I could not "trouble you until I had succeeded in finding a purchaser "for the house in the country, which is of no benefit to me, "but, on the contrary, a loss of several pounds a year, as more "than the receipts vanish in repairs.

"By a letter I received from Mr. P., about ten days ago, "he acquainted me he fully expected he had found a buyer, "and had agreed to the terms; however, not having subse-

"quently heard from him, I do not know whether I am to "consider it sold or still in the market. If I do not hear "again from Mr. P. in a post or two, I shall write to him "again respecting an affirmative or negative reply, whereby "the business may assume a tangible shape, and we shall "know how to proceed.

"When I last called upon you, you informed me you had "not received a letter from me, in which I requested you to "send me Mr. Bagshawe's rent he had expedited to you, to "Mr. Deacon's Reading-rooms, No. 154, Leadenhall-street, "where I am a subscriber. On my return to the country I "rated the man I employed pretty soundly for his negligence, "but in spite of all he roundly asserted that he had executed "my commission duly, and that, not being able to stop at "the post-office in Charing-cross, he had carried it on to "Lombard-street, as I told him to put it in the office there "or at the former place, as most convenient to him, as he was "obliged to go to the neighbourhood of both on other busi- "ness. Under this impression of uncertainty, whether he had "lost my letter or otherwise, I could not write to the secretary "of the General Post administration as I wished to do, but, as "you may suppose, I never employed this party afterwards.

"I do not know whether any of the documents in my pos- "session are required, supposing the house should be sold. "I hope not, as they were all sent to France several months "ago, excepting only the accounts, which remain in the ac- "countant's hands, who wished likewise for the vouchers, "which were never delivered to me; probably some of them "never came into your hands. There are many secondary "papers I never saw; amongst others that are missing are "those which relate to my application to the French Govern- "ment for the liberation of Mr. T. from prison, called Mazas, "in Paris, where he had been confined for the second time, "which was a very troublesome and expensive business in its "various forms. I suppose Mr. Mander—Henry, I think,—

1861.
Nov. 6 & 7 and Dec. 3.

STAINES v. STEWART AND JONES.

"—heir-at-law, whose chambers are in Lincoln's Inn, is the "proper person to apply to for them, and any others he may have "relating to the business. I have a right to all the papers they "may have, as they have been paid for by me, as well as the first "will made for T. by him. I have had a great deal of trouble in "endeavouring to find an executor to the will in lieu of Mr. J. "Two old friends I have irrevocably offended by proposing it to "them; one of these to whom I wrote, of course honourably ex- "plaining the position and circumstances, in his reply to other "subjects, took no notice whatever of my request—a sharp "satire, indeed, for me; but indeed I was wrong, all consi- "dered, to request a gentleman of real worth and unblemished "reputation to interest himself in a public document in which "a man is concerned who has long been, and still is, on the "black books, both of the English and French Governments.

"The other party to whom I applied verbally told me he "had heard, through other persons, there was not in all Soho "a greater blackguard than Mr. T., who was almost always "intoxicated, and not seldom hooted by the boys in the street, "who, when his hat fell off, would kick it about like a foot- "ball, and pull him by his coat in derision. As I knew this "statement to be a positive fact, I could of course offer no "opposition, although I was heartily ashamed of asking so "unseemly a favour. Of a certainty, my view in this quarter "proved abortive.

"It is now more than two years since I saw Mr. J., and "several more years—perhaps four at the least—since we "ceased to correspond, for reasons this is not the place to state.

"I cannot, therefore, as a man of honour, with the least "shadow of decency ask Mr. J. to interest himself in my "testament, which relates to a party I have some reason to "believe he never heard of (certainly not from me), for as the "wickedness I have to deplore commenced when he was very "young, as threats of murder, etc. etc., I took care that no "friend or relative I had should ever know from me that I

"was even acquainted with him, or that there was such a "person in existence. If, on the other hand, Mr. J. ever "heard of him, he must likewise have heard of his character "and propensities, of his having been expelled Mr. P.'s house "some years ago for misconduct, etc.

"In either case I conceive it would be indecent, indecorous, "and contrary to the usages of civil society, to think any "more of Mr. J. in this respect, which causes me to blush "that a man in so honourable a position in life as he is, popu- "lar in his neighbourhood, should by any casualty injure his "legitimate views in life, or compromise an advantageous "career, by ever coming into contact with a man who never, "as far as I hear, did anybody any good, and whose whole "happiness, or rather, misery, consists in the unrestrained "licentiousness of his libidinous appetite. This unhappy "victim, notwithstanding all that has been done for him, as "far as I learn, so far from repenting of the past, still runs "headlong, so to express it, to the gallows. Had he the "least spark of gratitude, or was there the slightest chance "of amendment, I should rejoice; but as it is, there is really "no room for hope. In a few days I expect my French cor- "respondent will arrive in England. Have the goodness to "send my will, addressed to the care of the housekeeper, 4, "Birchin-lane. I have several alterations in it to make. One "of the parties is dangerously ill, and another has not been "heard of upwards of a year and a half by any of his friends. "I wish to lay the document before the gentleman in ques- "tion, who is a man of standing; and possibly I may induce "him to supply Mr. J.'s place: at all events, I will endea- "vour to do so. As he usually resides in France, the obsta- "cle of Mr. T.'s sad propensities may not be injurious to him "at a future period, as they certainly will be to any one so "acting in this country.

"I remain, Gentlemen, yours very truly,

"W. STAINES.

"Messrs. Lanfear and Stewart."

1861.
Nov. 6 & 7 and Dec. 3.

STAINES v. STEWART AND JONES.

Pending judgment the plaintiff died; and Mr. Heard, the solicitor mentioned in the judgment, proved his will as executor, but no further step was taken, and judgment stood over.

Nov. 26.

Dr. Deane, for the executor of the plaintiff, moved the Court to give judgment.

SIR C. CRESSWELL: It had been intimated to me that the plaintiff was dead, and I had therefore put the case aside. At present I don't know you. If there is a personal representative, he must become a party to the record.

This having been done—

Dec. 3.

SIR C. CRESSWELL gave the following judgment:—In this case Theodore A. R. Staines cited William Stewart and the Rev. John Jones, clerk, to appear and support any interest that they claimed in the estate and effects of Matthew William Staines, deceased. The parties cited appeared and delivered a declaration, alleging that the deceased made his last will and testament bearing date on the 7th of October, 1858, and duly executed the same in the presence of two witnesses, etc. The plaintiff pleaded that the alleged will was not the will of the deceased, for that in or about the month of September, 1860, he destroyed it with the intention of revoking the same, and that he was then of sane mind. The defendants took issue on the plea, alleging the destruction of the will by testator.

The case came on for trial before me without a jury on the 6th of November, when Dr. Deane, for the plaintiff, opened the case, and called witnesses to prove the affirmative of the issue joined, viz., that the deceased in 1860 destroyed the will made in 1858, *animo revocandi.* For that purpose he called as a witness a young woman, Elise Plohn, a native of Hanover, who deposed that she became acquainted with deceased in

1861.
Nov. 6 & 7 and Dec. 3.

STAINES. v. STEWART AND JONES.

1854, having been introduced to him by her brother-in-law, a German named Siebert, and from that time till his death she cohabited with him as his wife. Siebert, who keeps a green-grocer's shop in Dock-street, Ratcliffe Highway, had become acquainted with deceased in 1853 on a voyage from Hamburg to this country. It appeared by the evidence of Elise Plohn that they lived at various places; that in 1858 they were living at Peckham. The deceased had then assumed the name of Richard Broughton. That at that time he told her he had made a will, and in answer to her inquiry as to its contents, said that it was a will which Mr. Stewart advised him to make; that he was not pleased with it because Mr. Stewart had driven him to make it without his wish; that Mr. Stewart had taken money enough of him, and he was determined it should not be the last (meaning as I conjecture the last will); that a few days after he sent her for the will to 4, Birchin-lane, that being the place to which he had desired letters and papers to be sent for him; that this was in February, 1858, and that she brought a parcel, and the envelope being shown to her identified it as that which she brought. In this she must have been greatly mistaken, for the will was not made till October, 1858, and it was not sent to 4, Birchin-lane, till the 5th April, 1860, when Mr. Stewart, in compliance with the testator's request, communicated by letter of the 2nd of April, enclosed it in the envelope produced, and sent it to 4, Birchin-lane. The address, etc., was written by one of his clerks. The letter from the testator of the 2nd of April was in these terms: (The learned Judge here read the letter printed above.) Elise Plohn further stated that, when she brought the will to deceased he did not open the envelope, and it was put away in the box with other things; that in 1860 they were living in Craven-place, Old Kent-road; that in July of that year she went to Germany, and returned on the 1st of August; that the deceased was at Craven-place ill, and attended by Mr. Hooper; that Mr. Hooper told him he had

1861.
Nov. 6 & 7 and Dec. 3.
STAINES, v. STEWART AND JONES.

a disease of the lungs, and advised him to make a will and have his affairs in order; that after Mr. Hooper left, deceased said he would go and travel, and leave Dr. Hooper; that afterwards he was lying in bed, and gave her the keys and told her to get the will out of the box, and she did so; that he told her to give it to him and a pair of scissors and he would cut it up; that she gave them to him, and he cut and tore it to pieces; that he said he did so because Mr. Stewart drove him to make it, and he did not like it. On cross-examination, she added that he said that Mr. Stewart had some papers of his, and he was obliged to make the will to get them from him. He said he had a near relation that the property ought to go to. He did not mention that he had a son. He told her she could have nothing from his land, but he would leave her some money. That when he had cut and torn it he gave it to her and desired her to burn it. There was a fire in the room close to the bed, and he could easily have thrown the paper into the fire himself as he lay in bed. That she said she had rather not burn it, as she might afterwards get into trouble about it, and he told her to do as she pleased, and she put it into the box again; that after he had cut the will he had got Siebert, who was there, to make an inventory of some plate, and take it to a pawnbroker's and raise money on it for the expense of his intended journey; that they left Craven-place on the 3rd of September, and went to various places, and at last to Dowry-square, Bristol, where he died on the 16th of December, 1860, and was buried in the name of Broughton, as he wished it; that he told her he took the name of Broughton in order that his lawyers might not know who he was, for they wrote to him and put him to expense; that after his death she came to London, and went to 4, Birchin-lane, and asked the housekeeper of the house if she knew anything of the affairs of the deceased; that the housekeeper told her she had heard deceased had a son, and advised her to consult a solicitor; that she went to a Mr. Heard, who

advertised for the son, and found him, and he instituted this suit; that she (witness) had never seen him.

Siebert was called, and gave the same account of the cutting of the will. On cross-examination he stated that he never heard of testator having a son, until that day in Court. He afterwards said that his sister told him a month or so before that the son had been advertised for; that he had never seen the son. The will and envelope were then put in. The will was attested by Mr. Lanfear, solicitor, 11, Abchurch-lane, London; Frederick J. Lee, clerk to Messrs. Lanfear and Stewart, 11, Abchurch-lane, London. Mary Ann Vowles, the woman in whose house he died, stated that on one occasion she was talking about her brother-in-law's death, when deceased said he had made a will, but had destroyed it.

Dr. Phillimore objected that this evidence was inadmissible according to the decision of the Q.B. in *Doe dem. Shallcross* v. *Palmer*, 16 Q.B. 747.

The first point to be determined, is with reference to the admissibility of the declaration attributed to the deceased by Mrs. Mary Ann Vowles. In *Doe dem. Shallcross* v. *Palmer*, 16 Q.B. 757, Lord Campbell, in delivering the judgment of the Court, said: "Declarations of the testator after the time when a controverted will is supposed to have been executed, would not be admissible to prove that it had been duly signed and attested as the law requires; and for the same reason a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible." Now suppose the revocation set up in this case had been a revocation by a subsequent will, and an instrument had been produced and the factum disputed, according to the very terms of the judgment quoted above, the declaration of the deceased made after the alleged execution of the second will could not have been admitted to prove the due execution of it. If such declaration could not be received under such circum-

1861.
Nov. 6 & 7 and Dec. 8.
STAINES v. STEWART AND JONES.

stances, could it be received to prove not only the due execution of an instrument produced, but of one not produced; could it be admitted to prove that he had duly executed a will containing a clause revoking a former will? It seems to me that it could not. If the declaration of a testator that he had revoked a certain will by a subsequent will could not be received, on what ground could a declaration that he had revoked it in any other manner be received? It seems to me plain that a declaration that he had revoked by burning, by cancellation, by tearing, must stand on the same ground as revocation by another will, and that such declaration would be inadmissible. A vague declaration that he had destroyed a will, not saying by what means or for what purpose, is still more objectionable. I think, therefore, that I am bound to discard the declaration ascribed to the testator by Mary Ann Vowles.

I have then to consider the direct testimony of Elise Plohn and Henry Siebert, and the probabilities of the case on the one side and the other. If the direct testimony is credited, there is an end of the case set up by the defendants that they are executors under an existing will. Now, as to Elise Plohn, her avowed position is said to have been such as to detract greatly from her credit. On the other hand, it was said that an unfortunate attachment, such as she had formed, did not prevent her being a truthful witness, especially as she had no pecuniary interest in the destruction of the will. There is some force in that argument: a want of chastity is not always a ground for discrediting a witness. On that point each case must depend on its own circumstances.

In the present case I cannot but think the connection that existed between Elise Plohn was, on her part, a calculating sale of her respectability for what she could gain. Her attachment must have been to the property of the deceased, and not to his person; and I think that her position did affect her credit. It appeared by her own account that he was in the habit of telling

her that he would leave her money by his will. If that is so with regard to Elise, what must we think of Henry Siebert? The evidence left no doubt on my mind that he had procured for his sister-in-law the situation of mistress to the aged testator, thus showing an amount of calculating moral depravity which renders him in a great degree unworthy of credit. But supposing Elise Plohn to have had a design upon the old man's property, how would that supply a motive for destroying the will? It is sometimes very difficult to trace the motive which leads to any particular act; we are often left to conjecture. Here she would gain nothing directly by the destruction of the will; but if the will existed, the property would all go to persons from whom she could not expect any favour. She had no means of conferring any favour on them so as to entitle herself to any consideration in return. If she destroyed the will, and so enabled the son to obtain the property, she might at least have the hope of gaining something in return for the information that his father had died intestate. She might be influenced by a desire to thwart the wishes of a testator who had not fulfilled his promise to leave her money.

These considerations are sufficient to deter me from assuming as a fact in the cause that she could not have had any motive for destroying the will.

But let us see how far her story is consistent with truth or probability. She says that in February, 1858, she was sent for the will and brought it to the testator. I have already pointed out her mistake as to the date of this transaction. The will was not made till October, 1858, and was not sent by Stewart to the testator till April, 1860. She described him as being dissatisfied with the will from first to last, and as imputing to Mr. Stewart that he had driven him to make it. Probably at the time when she says she was sent for the will it was for the draft of the will, which he returned approved, and therefore the story of his being compelled to make it against his inclination is incredible, and Mr. Stewart's evi-

1861. Nov. 6 & 7 and Dec. 8. STAINES v. STEWART AND JONES.

dence, to which I will advert more particularly hereafter, and the letters written by the testator from time to time, are entirely destructive of this account, and I must either conclude that the testator gave a false account to her (for which I can discover no reason), or she must have given a false account to the Court. In another respect also I find it difficult to credit her evidence. She stated that the deceased assumed the name of Broughton, in order that his attorneys, Lanfear and Stewart, might not know where he was, because they wrote to him and put him to expense. The evidence of Mr. Stewart showed that he always gave some address to which letters might be sent, and the letters produced show incontestably that a correspondence was maintained between them.

But further, it was argued that the preservation of the pieces of the torn will was strong corroboration of the evidence of Elise, for that had she and Siebert torn it, there could be little doubt they would have burnt the fragments. I do not feel the force of that argument. The mere absence of the will would have raised a *primâ facie* presumption that the deceased had destroyed it. If the witnesses had then deposed that he burnt it, there would have been nothing but the absence of the will to confirm their statement, whereas they may have fancied that the production of the fragments would be considered as a corroboration of the statement that the testator cut and tore it. But again, Elise swore that when the deceased desired her to burn the fragments, she declined, saying that by so doing she might on a future day fall into trouble. It is possible, to say no more, that such an apprehension operated on her mind and caused the preservation of the will, although it was not torn by the deceased.

I will now examine Mr. Stewart's evidence, together with the letters that passed between him and the deceased. The evidence of Mr. Stewart as to the arrangement for the life annuity to the son, is strongly corroborated by the letters and by the execution of the deed in 1859. Up to that time no trace

1861.
Nov. 6 & 7 and Dec. 3.
STAINES v. STEWART AND JONES.

of any dissatisfaction with the will was manifested. The subsequent letters show that the conduct of the son, which caused the making of that will, remained unaltered, and, which is still more important, the letters show adherence to it. Nearly two years after the date, he wrote about substituting another trustee and executor for Mr. Jones; but there is no trace of any desire to alter the will in any other respect. That satisfies me that the evidence of the woman Elise Plohn on that subject could not be true. But it may be asked, why, then, did he send for the will in April, 1860? And does not that, at all events, raise an inference that he probably wished to destroy it? The letter asking for it precludes any such inference. From that it appears that he wanted to see it, because he thought a death had occurred which might render it necessary to alter some small bequest, and because he wished to show it to a friend whom he expected to come from France, and whom he thought of asking to act as trustee and executor, thus showing, to the very last, an adherence to the arrangement made by the will for his unhappy profligate son. This review of the evidence given, and the probabilities of the case, has led me to the conclusion that I cannot safely rely on the evidence of the two witnesses who deposed to the destruction of the will by the act of the testator. I am therefore bound to find the issue joined as to the fact of revocation in favour of the defendants.

No order as to costs—the pieces of the will to remain in the Registry till executors take probate.

Dec. 10.

Dr. Phillimore, Q.C., moved the Court to decree probate, and to allow the testator's name in it to go with the *alias* of Broughton, under which name he had died and been buried.

Motion granted.

1861.
Nov. 12.

In the Goods of JANE FOREST, deceased (on Motion).

In the Goods of JANE FOREST.

Will.—Subscription.—Motion to omit name in Probate.

B. made her will in the presence of C. and D., who subscribed the same; subsequently E., an executor and legatee in the will, at the request of the testatrix, signed his name, to signify, as suggested, his acceptance of the executorship.

The Court rejected a motion praying to omit E.'s name in the Probate.

In this case the deceased had duly executed her will on the 3rd of December, 1857, in the presence of Henry Snowball and Thomas Ormston, and appointed William Thompson and Lionel Forster executors thereof. It appeared that subsequently Lionel Forster placed his name to the will at the request of the deceased, by way of signifying his acceptance of the executorship; he was also a legatee under the will.

Dr. Spinks now moved for probate of the will, omitting the signature of Lionel Forster. *The Goods of Logan Mitchell*, 2 Curt. 916, I am bound to say, seems against the motion. In the present case, however, Forster's name was added after the due execution and attestation of the will.

SIR C. CRESSWELL: I cannot grant this motion. If I were to omit the name in the probate, the next of kin would be precluded from raising the question in a court of construction. If it be retained, Forster will still be at liberty to show that he was not a subscribed witness to the will.

Motion rejected.

1862.
Jan. 21.

CLEVERLY AND ANOTHER v. GLADDISH.

CLEVERLY AND ANOTHER v. GLADDISH. In the Goods of HENRY CLEVERLY.

CLEVERLY and ANOTHER *v.* GLADDISH.

In the Goods of HENRY CLEVERLY, deceased (on Motion).

Administration de bonis non, *with Will annexed.—Fund in Court of Chancery.—Sureties to Administration Bond dispensed with.—Amount of Estate.*

Where the unadministered estate of a testator had been transferred to the Accountant-General of the Court of Chancery, and a bill had been filed praying for it to be administered by that Court, the Court decreed a grant *de bonis non* to the residuary legatee for life, without requiring her to find sureties to the administration bond.

The Court will not determine the amount under which an estate is to be sworn.

Henry Cleverly died in October, 1806, leaving a will and codicil, whereof he appointed his wife and three others executors. The will was duly proved in the Prerogative Court by the widow and two of her co-executors. The remaining executor renounced probate, but survived the other three, and died in November, 1837, without having proved the will.

The deceased, by his will, devised and bequeathed his residuary real and personal estate to the executors and trustees of his will, upon trust, after paying certain annuities, to pay the annual income thereof to his daughter Elizabeth Cleverly (now Mrs. Gladdish) for life; and, in default of her issue, he gave the principal to the children of his brother Samuel Cleverly.

Alfred W. Cleverly and O. Cleverly, sons of the said Samuel Cleverly, had filed a bill in Chancery against Mrs. Gladdish and her husband for carrying the trusts of the will into execution, and for the purposes of that suit it was necessary that there should be a personal representative to the deceased.

Alfred W. Cleverly had accordingly cited Mrs. Gladdish to take a grant *de bonis non* with the said will and codicil annexed.

1862. Jan. 21.

CLEVERLY AND ANOTHER v. GLADDISH. In the Goods of HENRY CLEVERLY.

Mrs. Gladdish had entered an appearance, and was desirous of taking the grant, provided she was not required to find sureties to the bond. The personal property of the deceased was sworn under £3,500 in 1807, when his will was proved. His executors and trustees for many years after his death continued to carry on his business of a lime-merchant for the benefit of the estate; and on Mrs. Gladdish attaining the age of twenty-three, when she became entitled to receive the income arising from the residue, the residue with the accumulation of the rents of the real estate and the profits derived from the business when invested in the funds, amounted to £21,252 New Three per Cents., which by an order of the Court of Chancery had recently been transferred from the names of the executors of the deceased into the name of the Accountant-General of the said Court, to the credit of the said cause.

Dr. Tristram moved the Court "to decree letters of administration *de bonis non* of the effects of the deceased with his said will and codicil annexed, to be granted to Mrs. Gladdish, as the beneficial residuary legatee for life, without requiring her to find sureties for the bond," which would be executed by her husband. The Court had power to dispense with sureties under the 81st section of the Probate Act. In this case, as the personal property had been transferred to the Accountant-General of the Court of Chancery, and would be administered by that Court, there was no risk of the estate being depreciated through Mrs. Gladdish's acts as administratrix, and therefore there could be no objection to dispensing with the usual sureties. The plaintiff who had cited Mrs. Gladdish to take the grant, would consent to the motion.

Mr. J. Salter, for A. W. Cleverly, consented to the motion.

SIR C. CRESSWELL: The property having been transferred

1862.
Jan. 21.

CLEVERLY AND ANOTHER v. GLADDISH.
In the Goods of HENRY CLEVERLY.

to the Accountant-General of the Court of Chancery, no risk can accrue to it by my dispensing with the sureties. I will grant this part of the motion. There is another part of the motion according to the notice filed in the registry, asking the Court to direct that Mrs. Gladdish should swear the estate under £3,500, which I cannot grant, as it is no part of my jurisdiction to determine the amount under which parties are to swear estates.

Dr. Tristram apprehended that this was a question which, if raised at all, could only be raised by the Stamp-office, and should be determined in the Court of Exchequer, and not here. He therefore did not ask for that part of the motion. The plaintiff asked that the order should direct the costs incurred by the plaintiff in issuing the citation and on this motion to be paid out of the estate. The defendant assented to it.

Decree.—Administration *de bonis non* with the will and codicil annexed granted to defendant, as residuary legatee for life. Bond to be given by her husband without sureties. Costs incurred by the plaintiff in issuing the citation, and on the motion, also the defendant's costs, to be paid out of the estate.

ROBERTS *v.* ROBERTS.

1862.
Jan. 16 and 21.

ROBERTS v. ROBERTS.

Will.—Conditional.—Evidence of Adherence.

B. wrote a testamentary paper in January, 1859, "should anything happen to me on my passage to Wales, or during my stay." He returned in about a week, and died in October of the same year; the will remaining in his writing desk, and having been alluded to by him after his return.

1862. Jan. 16 and 21.

The Court held, that the paper was in terms conditional, and that since the Wills Act no evidence of "adherence" is admissible.

ROBERTS v. ROBERTS.

In this case the deceased Robert Roberts, master mariner, died on the 4th of October, 1859.

On the 10th of January, 1859, he executed the following paper, immediately prior to starting on a voyage to the Welsh coast:—

"Liverpool, 10th Jan., 1859.

"This is to certify, I, Robert Roberts, master mariner, do "leave in possession two bank books to my wife, named "Emma Roberts; should anything happen to me on my "passage to Wales, or during my stay, I leave all my goods, "chattels, and all moneys, including two barometers, one ——, "one-eight day chronometer, one clock, one sextant, one qua- "drant, also charts and navigation books. The one baro- "meter is at Mr. Walker's, one chronometer and sextant and "quadrant.

"ROBERT ROBERTS."

The widow propounded this paper as universal legatee therein named, and was opposed by the mother of the deceased, who pleaded undue execution; that the paper was not the last will and testament; that the will was only intended to operate on the contingency of an event which did not take place; that the widow was not universal legatee; but gave notice of not intending to examine witnesses.

The case was now argued by *Dr. Wambey* in support of the will.

By *Mr. R. Pritchard contrà.*

It appeared that the deceased returned from the voyage on which he was starting, to the Welsh coast, after about a week's absence. Evidence was tendered that in September, 1859,

he referred to the will, and on being told that it was still in her writing desk, said, "There let it remain."

1862.
Jan. 16 and 21.

ROBERTS v. ROBERTS.

Cur. adv. vult.

The points argued are sufficiently stated in the judgment.

Jan. 21.

SIR C. CRESSWELL: In this case three questions were raised. First, whether the instrument propounded was of a testamentary nature; secondly, whether it was in its terms conditional; and thirdly, whether, being in terms conditional, it was rendered by adherence a valid will, although the condition was not performed. As to the first point, it may be doubtful what was left to the widow; but that is not the question. If a will, it must be admitted to probate, leaving the construction to another Court. I am of opinion that it is testamentary. Secondly, is it conditional? On that point I think the case of *Parsons* v. *Lanoe*, 1 Ves. sen. 189, is expressly in point, and that it is conditional. Thirdly, can it be rendered a valid will by adherence? There was evidence of adherence, but Mr. Pritchard contended that such evidence could not since the Stat. 1 Vict. c. 26, establish the will. It appears to me that his argument was well founded. The act of preserving the will cannot carry the case further than a parol declaration respecting it. But if the will in terms is conditional, he could not by any parol declaration alter it. All the cases cited were before the Statute of Vict. In principle it is like the case of a will made by a married woman, without consent of her husband. Before the statute such a will might be established by a parol recognition after her husband's death; for it was considered as a republication, but no such operation could be given to it now. In *Parsons* v. *Lanoe*, Lord Hardwicke said: "The penning of the will then being so (*i. e.*) conditional, "collateral or parol proof, cannot be taken into consideration, "which would be dangerous, and what the Court, since the "Statute of Frauds, is not warranted to do; for nothing will

1862. Jan. 21.

ROBERTS v. ROBERTS.

"set it up but some act done by him after that event to "republish the will or defeat the conditions." That was a devise of realty. The same doctrine is now made applicable to all wills made under the Statute of Victoria. For these reasons I feel bound to pronounce against the document propounded.

1861. Nov. 30.

HAWARDEN v. DUNLOP.

(*Before* SIR C. CRESSWELL *and a Special Jury.*)

HAWARDEN *v.* DUNLOP.

Issues joined in Probate Suit.—Effect of Scotch Confirmation of Executor, 21 *&* 22 *Vict. c.* 56.

The finding of the commissary as to Scotch domicil, under 21 & 22 Vict. c. 56, ss, 9, 12, is conclusive evidence of the fact of domicil for the purposes of that act only (see sect. 17), *i. e.* for rendering it unnecessary to take an English probate in respect of assets in England; but it has no effect in determining any issues raised in a suit in this Court, which will proceed to try such issues, though a confirmation of the will in question be tendered for the seal of the Court.

This was a question arising in a suit between Lady Hawarden, as sister and next of kin of Lord Elphinstone, who died in January, 1861, and George Dunlop, who propounded a will of the deceased of the 13th of February, 1854, in which he was sole executor and universal legatee. *Inter alia,* the defendant alleged that the deceased was at the date of the will domiciled in Scotland, and that the will was valid according to the law of Scotland.

To this the plaintiff pleaded:—1. That the will was not the will of the deceased. 2. That it was obtained by fraud. 3. That it was obtained by undue influence. 4. That the deceased was domiciled in England, and that the will was

not executed in accordance with 1 Vict. c. 26. 5. That, admitting the Scotch domicile, the will was invalid by that law.

These pleas were traversed and issue joined, which now came on to be tried by a special jury.

Proceedings to prove the will in Scotland had been taken by Mr. Dunlop, the defendant here, and the commissary had found by his interlocutor, that the deceased died domiciled in Scotland, and had confirmed Mr. Dunlop's nomination as executor, with full power, etc.

Mr. M. Smith, Q.C., *Dr. Phillimore*, Q.C., and *Mr. C. E. Coleridge*, for the defendant, before the jury were sworn, asked the Judge to direct the seal of the Court to be put to the Scotch confirmation of executor, which had been completed on the 27th of November instant. The 21 & 22 Vict. c. 56, s. 12, enacts, that when any confirmation of the executor of a person, who shall in manner aforesaid, be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in Scotland; such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England, as if probate or letters of administration as the case may be, had been granted by the said Court of Probate. The 9th section provides that the interlocutor of the commissary finding the domicil shall be conclusive evidence of the fact of domicil. The Court is merely ministerial in this matter; we produce the confirmation and claim the seal of the Court; the confirmation will then have the same force and effect as if probate were granted by this Court, and the finding of the commissary is conclusive of the domicil.

1861. Nov. 30.

HAWARDEN v. DUNLOP.

Serjeant Shee, Mr. Anderson, Q.C., and *Mr. Morgan Lloyd*, for the plaintiff: The interlocutor of the commissary is not final; there is an appeal from it, which, in fact, is asserted to the Court of Session; but however that may be, the 17th section of the Act already cited explains and limits the 9th, "Provided also, that any such statement and the interlocutor "of the commissary finding that the deceased was domiciled "in Scotland shall be evidence, and have effect for the pur- "poses of this Act only."

Mr. M. Smith, in reply: There is no evidence of the alleged appeal before the Court.

SIR C. CRESSWELL: I think I ought not to order the seal of this Court to be affixed. At first the words of the 9th and 12th sections startled me a good deal; but the 17th section explains that the finding of the commissary shall be conclusive evidence of the fact of domicil for the purposes of this Act only—*i. e.* for rendering it unnecessary to have an English probate for assets here, but not to determine or affect questions in issue in this Court, which I shall certainly proceed to try.

Upon this ruling an agreement was come to between the parties; the Court put its seal to the confirmation by consent of both parties, and no further proceedings were taken.

1862. Jan. 15 & 16.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

Wills.—Codicil.—Revival.—Revocation.—Costs.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

B. made a will in 1858, another in 1859, appointing the same executors, and containing a general clause of revocation, whereupon the will of 1858 was burnt with consent of the testator. In 1860, B. wrote a

1862.
Jan. 15 & 16.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

codicil, "It is my wish that this should be added as a codicil to my last will, made 1858." The executors propounded the contents of the will of 1858; certain legatees intervened, and, in fact, propounded the will of 1859; the next of kin opposed both wills.

Held, that the codicil of 1860 could not, by its reference to the will of 1858, give it validity as a will in writing to satisfy the requirements of Sect. 9 of the Wills Act, and that the codicil of 1860, containing no express intention to revoke, and not availing to set up an inconsistent will, did not in law, under the 20th section of the Wills Act, revoke the will of 1859. Probate of the will of 1859 and codicil of 1860. Costs of all parties out of the estate.

This was a question as to the validity of certain testamentary papers of Joseph Goodenough, deceased, the history of which is given in the following declarations and pleadings.

The declaration stated that Joseph Goodenough, late of Godmanstone, in the county of Dorset, gentleman, deceased, who died at Godmanstone aforesaid, on the 13th of November, 1860, made his last will and testament, bearing date on the 30th of June, 1858, and therein appointed the said George Rogers and George James Andrews, executors. That the said will, after having been reduced into writing, was signed at the foot or end thereof by the said testator, in the presence of two witnesses present at the same time, to wit, George Olive and William Raynold, jun., who subscribed the said will in the presence of the testator. That the said testator was at such time of the full age of twenty-one years, and of perfectly sound mind, memory, and understanding.

That on the 15th of April, 1859, the said testator, being still of sound mind, memory, and understanding, duly made and executed another will bearing date upon the said day, wherein he also appointed the said George Rogers and George James Andrews executors, and whereby he expressly revoked all former and other wills. That the said will, bearing date upon the 30th day of June, 1858, was thereupon, by direction of the said testator, entirely destroyed and burnt.

That subsequent to the destruction of the said will, bearing

1862. Jan. 15 & 16.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

date on the 30th of June, 1858, the said testator made a codicil, bearing date on the 2nd of February, 1860, and commencing with the words following, to wit: "It is my wish that this should be added as a codicil to my last will, made the 30th of June, 1858."

That the said codicil having been written by the said testator himself, was signed by him at the foot or end thereof, in the presence of two witnesses present at the same time, who subscribed the same codicil in the presence of the said testator, and whose names appeared thereon. That at the time of the execution of the said codicil, the said testator was of perfectly sound mind, memory, and understanding. That by virtue of the said codicil, the said destroyed will, bearing date on the 30th of June, 1858, was in law revived, and the said will bearing date on the 15th of April, 1859, was in law revoked, and the said will bearing date the 30th of June, 1858, and the said codicil bearing date on the 2nd of February, 1860, thereby became and now are the last will and testament and codicil thereto of the said testator.

That the paper writing now remaining in the Registry of this Court, annexed to the affidavit of scripts of the said George Rogers and George James Andrews, and marked with the letter A, contains certain instructions for a proposed codicil in the handwriting of the said testator, and the paper writing also now remaining in the Registry of this Court, annexed to the said affidavit of scripts, and marked with the letter B, contains the rough draft of the said will of the said testator, bearing date on the 30th of June, 1858, and was, in fact, a former cancelled will of the said testator, which, in pursuance of the instructions of the said testator, was altered as the same now appears. That the said will, bearing date on the 30th of June, 1858, and executed by the said testator as aforesaid, was, in fact, drawn from the said paper A, and the said paper B after it had been altered as aforesaid, and that the said paper A, and the said paper B after it had been altered

1862.
Jan. 15 & 16.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

in pencil as they now appear together, contain the whole sum and substance of the last will and testament of the said testator, bearing date on the 30th of June, 1858.

This declaration was demurred to on behalf of the defendant, Stephen Goodenough, the only son of the deceased, on the ground that, though the will bearing date the 15th of April, 1859, was in law revoked by the codicil of the 2nd of February, 1860, yet the will of the 30th of June, 1858, was not in law revived by the said codicil.

George Henry Rogers, and Mary Goodenough Rogers, and Herbert Goodenough Rogers, by the said George Henry Rogers, his guardian, interested as legatees under both the wills, obtained leave of the Court to intervene, and pleaded as follows:—That the said will bearing date on the 30th of June, 1858, was not revived, and the said will bearing date on the 15th of April, was not revoked as alleged. And for a second pleading the now pleading parties say that the said will bearing date on the 15th of April, 1859, was not revoked as alleged, but was only revoked so far as it was inconsistent with the said codicil or with the said revived will, and they say that, in divers particulars, the said will bearing date on the said 15th of April, 1859, was consistent both on the said codicil and the said revived will, and that the said will bearing date on the said 15th day of April, 1859, and the said revived will and the said codicil, now are the last will and testament and codicil thereto of the said testator. And for a third pleading the now pleading parties as to the said demurrer of the said Stephen Goodenough, say that the declaration is good in substance.

This third plea of the interveners was struck out by order of the Court on motion of counsel on behalf of defendant on the 26th of November, 1861.

To these pleas the defendant replied:—First, that he takes issue on so much of the first plea as alleges that the will bearing date the 15th of April, 1859, was not revoked. Second,

1862. Jan. 15 & 16.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

that he takes issue on all the facts in the second plea alleged. Third, that the testamentary papers in the second plea mentioned are not now the last will and testament and codicil thereto of the said deceased.

Issues joined on behalf of interveners.

The codicil of 1860 was as follows:—

"It is my wish that this should be added as a codicil to my "last will, made the 30th of June, 1858. First, I give to my "friend George Andrews's five sons, the sum of fifty pounds "each, to be deposited in the savings-bank (immediately after "my interment) for them until they come of twenty-one years "of age; should either of them not live to that age, then the "fifty pounds and interest thereupon to be divided amongst the "other children, boys and girls, share and share alike, of my "friend G. Andrews. I give my pony and carriage to Mr. "Rogers, with harness, etc. I give twenty pounds to Mrs. "Charles Hemming, and twenty pounds to Mrs. Andrews, that "they may purchase some little ornament in remembrance of "a sincere friend. I give my clock at the stair-head, and the "two Bibles on the table in the passage, the little box of worked "strawberries, and all the furniture in my present bedroom, to "my servant Mary Ann Sturmey. I give to Mrs. Newbolt, of "Paulerspury, the two china urns in the drawing-room. I give "to Joshua Orment, my servant, my boots, shoes, and the gun "he uses in the yard. I request a hatband and gloves may be "sent to the Rev. Mr. Newbolt, with gloves to Mrs. Newbolt, "and gloves to Mrs. Charles Hemming, Mrs. Andrews, and "the Miss Vestors, Mrs. Devenish; Mr. Phelps, hatband and "gloves, with gloves to Mrs. Phelps, and a hatband and gloves "to my friend and neighbour, Mr. Crane; and a further sum "of £5 each to my servants Ann and Lucy Waygood, if in my "service at my death. I give my Bath chair to Mrs. Baker; "and my cottage now occupied by James Davies, I give to my

"servant Mary Ann Sturmey for her life; at her death I give "the said cottage to my nephew and godson, Herbert Good- "enough Rogers.

"Signed, etc.

"Feb. 2nd, 1860."

It was admitted in argument that the names of Ann and Lucy Waygood occurred both in the will of 1859 and in the draft and instructions of the will of 1858.

The case was argued before the Court by—

Mr. Montague Smith, Q.C., and *Dr. Spinks* for the executors of the will of 1858: The question is, what effect has the codicil of 1860? It is clear that the testator did not mean to die intestate; he meant that there should be a will, and that this codicil should be a codicil to his last will. Does the knowledge of the testator that the will of 1858 was destroyed rebut the presumption of intention to revive that will? We submit that the reference to it by date is too precise. If it is a question of incorporation, we say that the testator intended to incorporate the substance of the will of 1858. The "intention to revive" required by the 22nd section of the Wills Act is satisfied by the revocation of the revoking instrument. It must be admitted that *Hale* v. *Tokelove*, 2 Rob. 318, and *Newton* v. *Newton*, the case recently decided in Irish Probate Court, and reprinted in L. T. Rep. (Oct. 26 and Nov. 2, 1861,) are, as far as they go, against us.

The *Solicitor-General* (Sir Roundell Palmer), *Dr. Deane*, Q.C., and *Dr. Middleton* for the interveners: Our case begins where the last case ends. Admitting that the will of 1858 cannot be set up, the question is, whether the codicil of the will of 1860 can operate as a pure and simple revocation. On either of two grounds we are entitled to probate of the will of 1859:

1862. Jan. 15 & 16.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

first, the date of the 30th of June, 1858, is a mere *falsa demonstratio*, and legitimate evidence would be admissible to show the mistaken reference; secondly, there is no independent intention of revocation. If the date is taken as necessarily attaching to the will of 1858, still there is no express intention to revoke; and if the codicil is not good to revive, how can it be to revoke? There are three classes of cases bearing on the present case to be considered—of the first, *Walpole* v. *Orford*, 3 Ves. 402, and *Walpole* v. *Cholmondeley*, 7 T. R. 138, are the principal; but there both wills were in existence at the death of the testator, and the codicil by its reference set up the earlier will inconsistent with the later. In the second class of cases there was no instrument to answer the description contained in the will which was capable of operating, and you must therefore admit evidence to make the words applicable to the real facts: (*Lord St. Helens* v. *Marchioness of Exeter*, 3 Phill. 461, in note.) To this class belongs also *Quincey* v. *Quincey*, 5 N. C. 154. The third class is, where the intention to revoke is conditional, and the deceased acted under a mistake either of law or fact: (*Onions* v. *Tyrer*, 1 P. Wms. 345.)

Dr. Phillimore, Q.C., and *Dr. Swabey* for the defendant: We, in fact, oppose both wills. As to the will of 1858, the 9th section of the Wills Act says, that no will shall be valid unless it shall be in writing and executed, etc.; but here is nothing in writing. In principle, it seems undistinguishable from cases of incorporation, where the rule requires that the instrument to be incorporated should have been in existence at the date of the executed instrument which incorporated it. The class of cases in which the substance or contents of testamentary papers are admitted to probate, are where a duly executed instrument has been lost, or wrongfully or unintentionally destroyed; for in cases of dependent relative revocation the law implies a want of intention on the part of the testator; but here, the will of 1858, after being revoked by that of 1859, was delibe-

rately destroyed with the knowledge of the testator. As to the will of 1859, the reference by the codicil of 1860 to the will of 1858 is so unambiguous that the mere fact of its non-existence at the time of death, cannot distinguish it from the rule laid down in *Walpole* v. *Cholmondeley*, so as to admit parol evidence. The reference to his last will of that date is a distinct declaration that the will of 1859 should not be his last will, and thereby revokes it. As to the doctrine of dependent relative revocation, there seems an entire absence in the circumstances of these wills of that relation between the acts of the testator on which that doctrine is founded.

Mr. Montague Smith was heard in reply: and Mr. George James Andrews was examined on behalf of the interveners, and proved that after the will of 1859 was executed, the will of 1858 was burnt in the deceased's presence and with his sanction; that the deceased afterwards told him he had some friends whom he wished to remember, and consulted him about making a codicil; and that he told the deceased how a codicil ought to be executed, and advised him to let him (Andrews) make it for him, and that the deceased said, no, he would do it for himself; that the date of the will to which it was to be a codicil was not mentioned, but that the deceased spoke of some bequests which were in the will of 1859, and not in that of 1858.

SIR C. CRESSWELL: There is great difficulty in some of the points argued in this case, and if I had to deal with all the questions which have been raised I should require time to examine the authorities; but the full and satisfactory arguments that I have heard enable me to dispose of it without any doubt in my own mind as to the decision that ought to be pronounced. One will was made in 1858 and another in 1859, and then the will of 1858 was actually destroyed, the will of 1859 having previously revoked it. A codicil was after-

1862. Jan. 15 & 16.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

wards made in terms purporting to be a codicil to the will of 1858.

The first question is, whether the codicil could revive that will, assuming that the reference to it by date was correct, and that it was the intention of the testator that it should be so revived. That is a question to be determined by the Stat. 1 Vict. c. 26. When the instrument had been destroyed, it no longer existed either in law or fact; it did not exist as a will from the time when the second will was executed; it no longer existed as a written instrument, as a paper writing, from the time when it was burnt. Not being either a will or a writing, how could it again become a will? That question seems to be decided by the statute; the 9th section says, "that no will shall be valid unless it be in writing and executed in the manner hereinafter mentioned." It has been said that it could again become a will, because it was revived by the codicil; but it could not be revived in its original condition of a written instrument, and thus the very first thing required by the statute in order to make a will, cannot be satisfied. It appears to me that the expression "no will shall be valid" applies equally to an original will and a revived will. Two cases have been cited—*Hale* v. *Tokelove* and *Newton* v. *Newton*—and, undoubtedly in both of these the decisions proceeded on the assumption that a document which had once existed as a will, and which had afterwards been destroyed, could not be revived by any intention of the testator manifested in a subsequent codicil. It is said that *Hale* v. *Tokelove* is a case *primæ impressionis:* but the decision of the very learned person who pronounced that judgment, was considered by the learned Judge of the Prerogative Court in Ireland, and by him affirmed, as far as that part of the case went, without the least hesitation. Sitting in a Court of co-ordinate jurisdiction, I should hesitate a long time before I departed from a precedent thus established, even if my own judgment had not gone along with it; but, for the reason I have assigned, I think it perfectly plain, according to

the statute, that the will could not be revived. The ingenious argument in answer to that view of the case, was founded upon the 22nd section. That section provides that "no will or "codicil, or any part thereof, which shall be in any manner re- "voked, shall be revived otherwise than by the re-execution "thereof, or by a codicil executed in manner hereinbefore re- "quired, and showing an intention to revive the same." But Mr. M. Smith should add the words, "but any will however "revoked may be so revived." I cannot go along with him in that construction, because it would violate the rules which the Legislature appear so cautiously to have laid down in the 9th section. I apply my opinion to a case where the will was destroyed by the testator, or in his presence, or with his authority and with his knowledge. I say nothing as to what would be the effect if the instrument had been destroyed without his knowledge. The question may arise on another day whether a person can revive an instrument, or rather the contents of an instrument, which no longer exists,—whether in that case the terms of the 9th section of the statute would be satisfied. My judgment is limited to the facts before the Court in the present case. The next question, which has been so much urged by the Solicitor-General, relates to the effect of the codicil upon the will of 1859. Now, what is there to revoke that second will? Certainly nothing in the codicil. It must be revoked by another will. Again, I think the statute disposes of that question. The 20th section provides that no will or codicil, or any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil executed in the manner required for the execution of a dispositive will, or by some writing declaring an intention to revoke the same, and executed like a dispositive will, or by the burning, tearing, or destruction thereof by the testator, or by some person in his presence and by his direction, with an intention of revoking the same.

Now, this codicil certainly does not in terms revoke the

1862.
Jan. 15 & 16.

ROGERS AND ANDREWS v. GOODENOUGH, and ROGERS, ROGERS AND ROGERS intervening.

will of 1859, nor does it in terms show any intention to revoke that will. There might have been an implied declaration of such an intention if the codicil had contained dispositions of the property so at variance with that contained in the will, that no part of the will could take effect if effect was given to the codicil. But the codicil has no such operation; it does not dispose of the property in a manner inconsistent with the will of 1859; it only shows an unexecuted intention to revive the former will. I am not aware that such an unexecuted intention could by any possibility have the effect of revoking the second will.

For these reasons it is unnecessary to deal with the two more difficult points which have been raised—one as to the admissibility of evidence to ascertain the supposed mistake made by the testator in referring to the will of 1858, and the other as to the very difficult and interesting subject of dependant relative revocation. On the grounds I have stated I agree entirely with the judgment of Dr. Lushington in *Hale* v. *Tokelove*, and with that of the Judge of the Prerogative Court in the Irish case of *Newton* v. *Newton*,[1] and I think that the codicil could not have the effect of making that again a will which no longer had any existence either in fact or in law; and that the codicil, for the reasons I have stated, had no operation in cancelling or revoking the second will. I therefore pronounce for the will of 1859 and the codicil of 1860; the costs of all parties should be paid out of the estate.

[1] Reversed in the Court of Appeal in Ireland.

1862.

HER MAJESTY'S PROCURATOR-GENERAL *v.* SAMUEL WILLIAMS.

Jan. 21.

In the Goods of MARY EMSLEY (Widow, deceased).

Interest Suit.—Receiver in Suit in Chancery in respect of same Estates appointed Administrator pendente lite.

In an interest suit between the Queen's Proctor and a defendant, asserting himself to be the lawful nephew of a deceased intestate, the Court appointed A. B., who had been made receiver in respect of the same estates in proceedings in Chancery, to be administrator *pendente lite*, on his affidavit that the estates in certain particulars would be benefited by being dealt with by a person clothed with such authority, and on consent of the parties to the suit.

The deceased in this case, Mary Emsley, died on or about the 13th of August, 1860, intestate, a widow, and without children. An interest suit was commenced by Her Majesty's Procurator-General on behalf of the Crown, against Samuel Williams, asserting himself to be the lawful nephew and one of the next of kin of the deceased. The deceased at the time of her death was seized of or entitled to certain freehold, copyhold and leasehold estates, moneys, etc. In the Rolls Court, in a suit touching the estate of the said deceased, between the said Samuel Williams, plaintiff, and William Rose and Her Majesty's Procurator-General, defendants, Henry James Peachey had been duly appointed receiver of the rents and profits of certain freehold and leasehold estates of the deceased in the said order mentioned; and in another suit in the Rolls Court, touching the said estate, between Samuel Williams, plaintiff, and Her Majesty's Procurator-General, defendant, the said Henry James Peachey had been duly appointed receiver of the rents and profits of the real and leasehold estates, and to collect and get the outstanding personal estate pending the litigation in this court.

This appeared by the affidavit of Mr. Peachey, who further

1862.
January 21.

HER MAJESTY'S PROCURATOR-GENERAL v. SAMUEL WILLIAMS.

stated that, as such receiver, he had had the offer for the purchase of certain of the leasehold property, subject to the approval of the Court of Chancery, which he considered advantageous. That an action of ejectment in respect of the said leaseholds was pending for breach of covenant of repairs, to which he was advised there was no valid defence, but which he had not authority, as receiver, to compromise. That it would be for the benefit of the estate that certain sales of furniture should be made, and certain debts due to the estate recovered, for which purpose an administrator *pendente lite* was necessary; also that certain deeds, muniments of title and securities connected with the property of deceased were in the possession of the Queen's Proctor, who objected to part with them except to an administrator *pendente lite.*

Dr. Swabey moved the Court, on behalf of the said H. J. Peachey, to appoint him administrator *pendente lite.* Notice of the motion had been given to the Queen's Proctor and to the attorney of defendant, and there was no objection.

Motion granted.

January 28.

In the Goods of JOHN WALKER.

In the Goods of JOHN WALKER (deceased), on Motion.

Will.—Attestation Clause.—Signature of Deceased.

Deceased read over an attestation clause containing his name, written by himself, in the presence of two witnesses, who subscribed their names. Deceased then, on the opposite page of the paper, wrote some words, beneath which he added, "Attestation. John Walker, testator," and the names of two executors.

HELD, that the deceased intended to give effect to his will by the signature of his name in the attestation clause.

1862.
January 28.

In the Goods of JOHN WALKER.

In this case the deceased made his will on the 11th of June, 1860, the second page of which ended as follows:—

"And I hereby appointed two executors, John Walker and "Lawrence Walker, of this my will, as witness my hand, this "day, 11th June, one thousand eight hundred and sixty.

"Attestation.

"Signed and acknowledged by the said John Walker, the "testator, who at his request, in his presence, and in the pre- "sence of each other, have hereunto subscribed our names as "witnesses.

"ADAM HEYWORTH.
"EDMUND JACKSON."

On the third page was written:—

"I give devise of property to executors in trust and to pay "proceeds to testator's children, with provision for main- "tenance during minority of children.

"Attestation.

"JOHN WALKER, testator.
"LAWRENCE WALKER, } Executors."
"JOHN WALKER, }

From the affidavit of the surviving subscribed witness it appeared that Jackson and Heyworth were present together on the date of the will with deceased. That the deceased said, "This is my will, and I wish you both to witness it; I shall "have to read part of it over as a matter of form, after "which you will sign your names to it as witnesses." That he then read the words on the second page, as given above, down to "subscribed our names as witnesses;" that Heyworth and Jackson then signed their names at the end of the second page; that the deceased then wrote in their presence the words which appeared on the third page of the will; and that the whole of the writing, with the exception of their signatures, was in the deceased's own hand.

1862. January 28.

In the Goods of JOHN WALKER.

Dr. Spinks moved the Court for probate: The reading over the attestation clause, in which is the deceased's name, was equivalent to an acknowledgment of that as his signature. What he wrote afterwards can be no part of the will, and is merely superfluous as regards the execution.

SIR C. CRESSWELL: I agree that the signature in the attestation clause must be taken from the circumstances alleged to be that by which the deceased intended to give effect to the will. What appears to have been written afterwards seems a sort of memorandum of what he thought he had done by the will. *Motion granted.*

February 22.

In the Goods of ALEXANDER STODDART.

In the Goods of ALEXANDER STODDART (deceased), on Motion.

Scotch Marriage Contract or Settlement.—Quasi *Testamentary Indorsement.*

B. and C., domiciled Scotch people, in contemplation of their marriage, entered into a contract or settlement in December, 1823, under which they had certain powers of appointment. On the fly-sheet of the settlement appeared what described itself as a codicil dated September, 1832, signed by B. and C., and attested by two witnesses. Below this, under date of 1st January, 1837, was an holograph of Alexander Stoddart, and signed by him, which purported to be testamentary. In 1855, deceased acquired an English domicil, which he retained till death.

On motion, the Court refused to grant letters of administration with the settlement and two writings annexed, as together containing the a nd codicil thereto of deceased.

Alexander Stoddart, late of Barton Moss near Manchester, in the county of Lancaster, died there on the 10th of May, 1860.

1862.
February 22.

In the Goods of ALEXANDER STODDART.

He was born at Dumbarney, in the county of Perth, in Scotland, where he resided until about the year 1855, when he relinquished his Scotch domicil, and took up his residence in England. Prior to their marriage, to wit on the 23rd of December, 1823, the deceased and his then intended wife, Catherine Dewar, entered into a contract or settlement in contemplation of their said marriage.

It appeared by this contract that certain moneys and property were settled upon certain trusts therein declared, with power for the said deceased, and failing his so doing, for the said Catherine Dewar, in the event of her surviving him, by a writing under his or her hand, at any time in their respective lifetimes, to divide and apportion the said money amongst the issue of the marriage, as he or she should think proper; and failing such division, the same to be divided amongst such issue, and certain persons were appointed trustees.

The marriage was subsequently duly solemnized, and there had been issue three sons and one daughter, all of whom were living and had attained their majority.

On the fly-leaf of the said contract appeared three documents, all in the deceased's handwriting, of which the following are copies:—

"Since the foregoing pages were wrote, circumstances have "occurred to make us, Alexander Stoddart and Catherine "Dewar, add a codicil, wherein we cancel William Gardner, "W. S. Edin and his heirs, James Condie, writer, Perth, heir "of the late Mr. George Condie, and appoint Alexander Stod- "dart, of Ballendrick, John M'Laun, farmer, Wester Rhina "and Catherine Dewar, should she survive her husband Alex- "ander Stoddart.

"Viz.: that the whole effects heritable and personal shall, "at the death of the longest liver, be equally divided amongst "their children. Should Catherine Dewar survive her hus- "band, Alexander Stoddart to have the interest of the whole "during her lifetime, but should it be deemed advisable by

1862. February 22.

In the Goods of ALEXANDER STODDART.

"the trustees when our sons enter into business, each of "them to get five hundred pounds at the age of twenty-"three. Wrote by Alexander Stoddart, and subscribed by "him, and the said Catherine Dewar, on the 19th day of Sep-"tember, eighteen hundred and thirty-two, before these wit-"nesses, Alexander Comb and Thomas Scot, residing at Dun-"kirk.

"ALEXANDER STODDART.
"CATHERINE DEWAR.

"ALEXANDER COMB, Witness.
"THOMAS SCOT, Witness."

"1st Jan., 1837.

"Bought the land of Woodside for fifteen hundred and "twenty pounds sterling; Laurence to have the offer of it "at the same. Should he not incline to take it at the above "sum, to be offered to the others; but should none of them "be inclined to take it, in that case to be sold, and equally "divided after their mother's death.

"ALEXANDER STODDART."

"Dunkirk, P.S., 28th August, 1845.

"Owing to a great deal of money being laid out on Wood-"side, to be given at what it may be reckoned worth at my "death, who have withdrawn my brother's name for reasons "here not necessary to explain.

"ALEXANDER STODDART.
"CATHERINE DEWAR."

Dr. Spinks now moved the Court to decree letters of administration, with the document dated the 19th of September, 1832, and the original contract or settlement, as together containing the last will and testament of the deceased, and the codicil dated the 1st of January, 1837, annexed, to Laurence

1862.
February 22.

In the Goods of ALEXANDER STODDART.

Stoddart and Alexander Stoddart, two of the lawful children of the deceased, on the renunciation of Catherine Stoddart, the widow of the deceased, there being no executor or residuary legatee named in either of the papers. There are affidavits as to deceased taking up his domicil in England, in 1854, and as to the document dated the 1st of January, 1837, being in the deceased's handwriting. The first document, described as a codicil, executes the power of appointment contained in the settlement, and would embody it. The writing of the 1st of January, 1837, is holograph of the deceased before the Wills Act, and as such a good testamentary document.

BY THE COURT: This writing does not relate to anything in the original settlement, nor to anything in that which the deceased calls a codicil, but to something bought since. How do you connect it with what went before?

Dr. Spinks: It is on the same document with that which is called a codicil; at least it ought to go to a court of construction.

SIR C. CRESSWELL: In 1837, the deceased, according to your statement, was domiciled in Scotland. You don't show me that the document of which you ask probate would be a good testament according to Scotch law. I cannot grant this motion.

Motion rejected.

1862.
Jan. 28 and Feb. 4.

In the Goods of LOUISA MORRIS, Widow (deceased), on Motion.

In the Goods of LOUISA MORRIS.

Administration.—Guardian elected by Minors.—Testamentary guardian.—Practice.

A testamentary guardian of minor children is entitled to a grant of administration for their use and benefit, preferably to a guardian elected by the children. Grant made to the latter revoked, and a fresh grant made to the testamentary guardian.

SEMBLE, where a general grant of administration is properly made, the practice is against revoking it, even with consent of the grantee, unless the grantee has become incapable by the act of God. Grants to creditors, however, are an exception to this rule.

In this case the deceased died on the 31st of January, 1861, intestate. On the 11th of March in the same year letters of administration to her estate were granted to Edward Clutterbuck, the lawful uncle, one of the next of kin of and curator or guardian, duly elected by the four minor children of the intestate, for their use and benefit, and till one of them should attain the age of twenty-one years. The property was sworn under £450, consisting of furniture and other effects bequeathed by the will of her late husband, and which were supposed to form part of her estate. It was ascertained, however, in May, 1861, that the before-mentioned property did not belong to the estate of the deceased, but that a sum of £4000 Bank Annuities did belong thereto. It was therefore necessary that the amount of deceased's property should be re-sworn, further security given, and duty paid. Meantime the health of the administrator had become so impaired, that he was unfit and unwilling to continue the administration. The question as to the £4000 turned upon whether the widow had or had not made a certain election under her husband's will, and in respect thereof Colonel Clutterbuck had petitioned the Court of Chancery for directions.

1862.
Jan. 28 and Feb. 4.

In the Goods of LOUISA MORRIS.

Mr. Kenneth Leith Sutherland, an executor of the will of the deceased's husband, and therein appointed testamentary guardian to the minor children, was willing to take out administration to the deceased, if the Court would revoke the grant of the 11th of March to Colonel Clutterbuck.

Dr. Deane, Q.C., moved the Court accordingly: The testamentary guardian is, by the practice of the Court, entitled in priority to the guardian elected by the minors. The present administrator has not intermeddled, and the whole proceeding was under a mistake. He referred to Coote's Probate Practice, 148 (2nd edit.), and cases there cited.

SIR C. CRESSWELL: Even with consent of the original administrator, is there any precedent for revoking a regular grant of administration, unless by the act of God the person has become incapable? As far as I understand, there is no instance in the registry where that has been done simply on account of age or infirmity.

Cur. adv. vult. as to practice in registry.

SIR C. CRESSWELL: The case* which has been looked up in the registry does not result in much—it is hardly in point. But here the original grant was made to a guardian elected by the minors; and it turns out that there was a testamentary

* In the case of Edward Hoare (T. T. 1833), referred to in "Coote's Practice," *ubi supra*, it appeared that a Mrs. French lent the intestate certain moneys, upon the security of a certain estate, which the intestate afterwards sold, or contracted to sell, to another person. Mrs. F. filed a bill against the purchaser, who eventually paid her the whole of the mortgage with interest. Between filing the bill and the receipt of the money, Mrs. F. took administration to the intestate on the renunciation of his widow and children (through their guardian). The Court made a new grant to one of the children after revoking the grant which had been made to the creditor.

1862. Jan. 28 and Feb. 4.

In the Goods of LOUISA MORRIS.

guardian under the father's will, who has a preferable right, and is now willing to take out administration. The revocation and fresh grant may therefore go as prayed.

1861–2. Dec. 24, Jan. 28 and Feb. 4.

In the Goods of JOHN GAUSDEN.

In the Goods of JOHN GAUSDEN (deceased).

Will.—Paper pasted on Parchment.—Signature at Foot or End.—Probate by Consent.

In this case the will of the deceased was written by an illiterate hand on one side of a sheet of parchment. On the right-hand corner of the bottom of the parchment was pasted a piece of paper with a 2*s.* 6*d.* stamp impressed; the paper covered rather more than half the breadth of the parchment, but there would have been room at the left-hand corner of the bottom of the parchment for the names of the testator and attesting witnesses: in fact, these names were written on the paper pasted on as follows:—

"Of December, 1855,

"Signed by me, JOHN GAUSDEN 17th.

{ 2*s.* 6*d.* stamp. }

"THOS. STEPHENS, Wheelwright,

"CHARLES STEPHENS, Wheelwright.

"SAMUEL LEWIS, Labourer."

From the affidavit of Mary Gausden, the executrix named in the will, and therein described as the wife of the deceased, and from the affidavits of the attesting witnesses, it appeared that the stamped paper was pasted on the parchment, before the execution of the will, in the presence of the deceased, and by the advice of the writer of the will, with the idea of giving greater validity to it; that nothing was written on that part of the parchment over which the paper was pasted; that the

paper itself was blank when the attesting witnesses were called in; and that the deceased in their presence wrote the date and his name as above given, and that they wrote their names and occupations with the intention of attesting his signature to the will.

1861-2. Dec. 24, Jan. 28 and Feb. 4.

In the Goods of JOHN GAUSDEN.

Dr. Swabey moved the Court to grant probate to the executrix therein named. He contended that the piece of paper so affixed as stated in the affidavits formed, in point of law, one piece of material with the parchment. December 24.

SIR C. CRESSWELL: I am not inclined to grant probate of this on motion—at least without citing those interested under an intestacy.

Motion to stand over.

Dr. Swabey renewed the motion.—The consent of the father of the deceased to the grant of probate was filed, and, from his affidavit and that of the executrix, it appeared that her marriage was legally void by reason of affinity, so that the deceased had died a widower without child, leaving his father next of kin and solely entitled, etc. The property was small, and it would be very undesirable to expend it in a suit. January 28.

Cur. adv. vult.

SIR C. CRESSWELL, after stating the facts as above, said: I have certainly felt a good deal of difficulty as to the effect of this intended execution, and I have bestowed much thought upon it. On the whole, especially as all parties interested consent, I think I ought to grant probate. Assuming that the parchment and paper were in the same condition when the names were written as they now appear, as I must assume on these affidavits, I think that it is a signature at the foot or end, within the meaning of the 9th section of the Wills Act. But if not so, I think, subject to the same assumption February 4.

1861–2.
Dec. 24, Jan. 28 and Feb. 4.
In the Goods of JOHN GAUSDEN.

as to facts, that it would be saved by the clause of Lord St. Leonards' Act which declares that "every will shall, so far "only as regards the position of the signature of the testator, "be deemed to be valid within the said enactment, as explained "by this Act, if the signature shall be so placed at, or after, "or following, or under, or beside, or opposite to the end of "the will, that it shall be apparent on the face of the will that "the testator intended to give effect by such his signature to "the writing signed as his will." I much wish, however, that the amount of property would have borne a suit and formal argument. *Probate granted.*

1860.
April 20.
GRIMWOOD v. COZENS AND OTHERS.

GRIMWOOD *v.* COZENS and OTHERS.

Codicil Dependent on Will.—Effect of Destruction of Will. —Intention of Testator.—Onus Probandi.

A codicil is *primâ facie* dependent on the will. Where a will and codicil to it have been in existence, and the will has been subsequently destroyed by the testator, the burthen of proof is on the party setting up the codicil, to show that it was the intention of the testator that it should operate separately from the will; otherwise the presumption is that by the destruction of the will the codicil was revoked.

Mrs. Kitty Grimwood, late of Maldon, in the county of Essex, widow, died on the 28th of December, 1857. On the 19th of August, 1853, she duly executed a will, in which she named her daughter Mrs. Elizabeth Richardson Cozens, together with Messrs. John and William Crick, executors and trustees. By this will she gave the whole of her real and personal estate to her trustees in trust for Mrs. Cozens for life,

and afterwards to be divided equally between Mrs. Cozens' children. On the 3rd of April, 1854, the deceased duly executed a codicil to her will in the following terms :—

"A codicil to the last will of me, Kitty Grimwood, of Mal-
"don, Essex, widow :—

"I appoint my grandson Jeffery Grimwood Grimwood, to
"be an executor, and a trustee of my said will, in conjunction
"with the executors and trustees appointed thereby, and direct
"that my said will shall be read and construed as if the name
"of the said Jeffery Grimwood Grimwood had been in-
"serted therein whenever the names of the executors or
"trustees appointed by my said will are therein named, or
"are referred to. I give all my printed books, pictures, and
"engravings, and also my best plate, to my said grandson
"Jeffery Grimwood Grimwood; an inventory of which plate I
"intend shortly to make in my own handwriting, and to en-
"close it in the same cover with my will and this codicil.

"Witness my hand this 3rd day of April, 1854.

"KITTY GRIMWOOD.

"Signed, etc., the 3rd April, 1854.

"WILLIAM CRICK, Maldon.
"WILLIAM FREEMAN, Maldon."

On the death of the deceased the above-mentioned will, after due search, could nowhere be found, and it was admitted by all parties that the deceased had destroyed it *animo revocandi.* The codicil was found tied up in a cover, with three unexecuted testamentary papers, which were in the handwriting of the deceased. The names of the attesting witnesses to the codicil were struck through, and on the back was written, "Mrs. Elizabeth Cozens and Mr. Jeffery Grimwood Grimwood, executors of this." The papers found with the will were to the following effect:—A letter without date. "My dearest Elizabeth,—When it shall please God to take "me, I hope you will see to all the things I may leave behind.

1860. April 20.

GRIMWOOD v. COZENS AND OTHERS.

"Let dear Jeffery have the plate, books, and pictures, and "give Elizabeth Keyes £200 for her own use, and to Robert "Keyes £10, and to all his sisters £10 each, married or sin- "gle, and what I leave besides do you take what you please; "but I hope you will not let anything be sold by auction; "what you do not like, give to my nieces; and what they "do not like, change away for something they like better." Secondly, a paper dated the 15th of October, 1857:—"This is "my last will or codicil, and I wish to have it complied with. "My dear grandson Jeffery Grimwood Grimwood I leave "my sole executor to pay all my little bequests. To his sister "Augusta, my dear grandchild, and Catherine Whitehead, my "great grandchild, I leave £300 to each of them; and the "£600 is in the Bank, which I take interest for; and the "rest I leave to you and my dear child, your poor afflicted "mother, to divide between yourselves. This is my wish and "request." The third was dated on the 29th of November, 1857:—"My dearest Elizabeth,—I appoint you my executrix "with my dear grandson, Jeffery Grimwood, whom I have "appointed to be my executor jointly with you, to divide "what I leave behind, to divide between you and him. I "hope you will not let any one beside have anything to do "with my affairs. If it please God to restore your health, "you will be quite able to do it with dear Jeffery's assistance. "I have destroyed all other wills or codicils. No one will "have anything to do with what I leave but you and dear "Jeffery; if any one of those I have left a legacy to dies, that "share to come to you."

Mr. Jeffery Grimwood Grimwood applied for probate of the codicil, and Mrs. Cozens for letters of administration of the effects of the deceased (Mrs. Grimwood) as having died intestate. The grounds stated on behalf of Mrs. Cozens were, "that regard being had to the statements of the deceased in "the unexecuted memorandum, dated the 29th of November, "1857, that she had destroyed all other wills or codicils, and

"to the fact that the will dated the 19th of August, 1853, after "diligent search and inquiry in and of all likely places and "persons, could not be found, it might be presumed that the "deceased destroyed the will with an intention to revoke the "same; that the codicil dated the 3rd of April, 1854, being "dependent on the said will, was also revoked by its destruc- "tion; and that the appearance and the contents of the co- "dicil itself, and the contents of the memoranda of the de- "ceased, show that it was not the intention of the deceased "that the codicil dated the 3rd of April, 1854, should operate "as a substantive testamentary paper."

Dr. Deane, Q.C., for Mr. Grimwood, admitted that if the codicil were dependent upon the will, the destruction of the will would be, notwithstanding the 1 Vict. c. 26, s. 20, a revocation of the codicil; but he submitted that if the codicil had any separate operation, it would not be so revoked. The codicil before the Court was intended by the deceased to be a substantive testamentary instrument, and independent of the will.

Dr. Middleton, for Mrs. Cozens, maintained that the deceased executed the codicil as an addition to and dependent on the will; that when she destroyed the will, she intended to revoke the codicil, and believed that she had done so; and that that being so clearly her intention, a sufficient act had been done by the destruction of the will.

Dr. Tristram appeared for Messrs. Crick, two of the executors named in the will.

The cases cited were—*Barrow* v. *Barrow and others* (2 Lee, 335); *Plenty* v. *West and Budd* (1 Robert, 264); *Tagart and Bakewell* v. *Hooper and others* (1 Curt. 289); *Medlycott* v. *Assheton* (2 Add. 230); In Re *Goods of R. Hallwell* (4 N.C. 400); and *Clogstoun* v. *Wallcott* (5 N.C. 623).

1860.
April 23.

GRIMWOOD
v.
COZENS AND
OTHERS.

SIR C. CRESSWELL: I think it has been established by the cases cited at the bar, that previous to the passing of 1 Vict. c. 26, a codicil was *primâ facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute. The question, then, is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shown, by the party applying for probate of the codicil alone, that it was intended by the deceased that it should operate separately from the will; otherwise it will be presumed, that, as the will is destroyed, the codicil is also revoked. In this case the codicil is entirely dependent on the will, and more particularly that portion of it which alone gives Mr. Grimwood authority to come here and make this application. What claim has he to be here except by favour of those words of the codicil, which have no meaning unless read with the will? I think the intention of the deceased may be pretty clearly ascertained from the papers before the Court. She intended to make another will. By the paper dated the 15th of October, 1857, she does not treat the previous appointment of Mr. Jeffery Grimwood Grimwood to be executor as operative. That paper is headed, "This is my "last will and codicil," and by it she appoints her grandson her sole executor, as if she were so appointing him for the first time. The letter addressed to her daughter, without any date, makes no reference to the appointment of Mr. Grimwood as executor at all, but shows a desire that Mrs. Cozens should settle her affairs, and instructs her to "let dear Jeffery have my plate, books, and pictures," a direction quite unnecessary if the codicil was operative. The paper dated the 29th of November, 1857, addressed to the daughter, commencing—"I appoint you my executrix with my dear grandson, Jeffery Grimwood, whom I have appointed for my exe-

"cutor," clearly refers to the paper dated the 15th of October, 1857, and to no other; and the indorsement on the back of the codicil,—"Mrs. Elizabeth Cozens and Mr. Jeffery Grimwood Grimwood, executors of this," must also point to the same papers. There is therefore nothing in these papers to show that the deceased supposed the codicil to be still in operation. The fact of the striking through the names of the attesting witnesses, on the contrary, satisfies me, that she intended to revoke it. I refuse to grant probate of this codicil, but it is a case in which I think the costs of all parties should be paid out of the estate.

In the Goods of BETTY FARADAY, wife of Martin Faraday (deceased), on Motion.

1861.
Nov. 5 and 19.

In the Goods of BETTY FARADAY.

Wife.—Protection Order.—Registration.—20 & 21 *Vict. c.* 85, *s.* 21.

B., a married woman, obtained a protection order for her property on the 12th of April, 1861; she made a will on the 19th, and died on the 24th of the same month. The order was not entered with the Registrar of the County Court till the 24th, being more than ten days after it was obtained.

HELD, that the requirement of the statute as to the entry of the order with the Registrar is directory and not imperative, and, on affidavits from the executors that they were ignorant of the husband's place of abode, probate was granted, limited to the property acquired since the date of desertion.

In this case Betty Faraday, wife of Martin Faraday, died on the 24th of April, 1861, leaving a will dated the 19th of April, 1861, whereof she had appointed her sons executors. On the 12th of April, 1861, the deceased obtained from the justices of the peace in the division of Bury, in the county of Lancaster, an order protecting her property and savings, etc., from her husband, his creditors, and persons claiming under

1861. Nov. 5 and 19.

In the Goods of BETTY FARADAY.

him, from the year 1832, when he had deserted her. The order was not registered in the County Court of Lancashire till a few hours before her death, on the 24th of April, being two days later than the time required by the 21st section of the Divorce Act, 1857: "A wife deserted by her husband may "at any time after such desertion, if resident within a metro- "politan district, apply to a police magistrate, or if resident "in the country, to justices in petty sessions, or in either case "to the Court, for an order to protect any money or property "she may acquire by her own lawful industry, and property "which she may become possessed of after such desertion, "against her husband, or his creditors, or any person claiming "under him; and such magistrate, or justices, or Court, if satis- "fied of the fact of such desertion, and that the same was with- "out reasonable cause, and that the wife is maintaining herself "by her own industry or property, may make and give the "wife an order protecting her earnings and property acquired "since the commencement of such desertion, from her hus- "band, and all creditors and persons claiming under him, and "such earnings and property shall belong to the wife as if she "were a *femme sole*. Provided, always, that every such order "if made by a police magistrate or justice in petty sessions, "shall, within ten days after the making thereof, be entered "with the Registrar of the County Court within whose juris- "diction the wife is resident," etc.

Dr. Phillimore, Q.C., now moved for probate to the executors of the will. The words of the section requiring registration are directory and discretionary, not imperative: (*Reg.* v. *Loxdale*, 1 Burr. 447; *Pearse* v. *Morrice*, 2 Ad. and E. 84.)

SIR C. CRESSWELL: Suppose the woman had made a will and died before the expiration of the ten days, the order remaining unregistered at the time of death?

Dr. Phillimore: I submit that the will would be valid. The power to make it depends upon the protection order, not on the registration. 1861. Nov. 5 and 19.

In the Goods of BETTY FARADAY.

SIR C. CRESSWELL: I am inclined to think so, but the probate must be special, setting out the circumstances; but I also think that the husband should have notice of the motion. If the executors have no knowledge of where he is, affidavits to that effect must be filed.

Dr. Phillimore renewed the motion on an affidavit of the executors to the effect that the husband's place of residence had not been known since his desertion in 1832, and that 1851 was the last year in which they had seen him, and that they had no means of ascertaining his present abode. Nov. 19.

SIR C. CRESSWELL granted probate, limited to the property acquired by the deceased since the date of the desertion as fixed on the protection order.

In the Goods of GEORGE AUGUSTUS FREDERICK SMITH (deceased).

1861. Nov. 19.

In the Goods of GEORGE AUGUSTUS FREDERICK SMITH.

Administration de bonis non.—*Doubt as to correctness of original grant.*

In 1807, the Prerogative Court granted letters of administration with the will annexed to B. as substituted legatee, reciting that no executor had been named in the will, and that C., the universal legatee for life, had survived the testator, but died without taking administration. On application for administration *de bonis non*, a doubt arose in the Registry, on looking at the will, whether the property had not been given absolutely to C., and consequently whether the grant in 1807 was not incorrect.

Nov. 19.

In the Goods of GEORGE AUGUSTUS FREDERICK SMITH.

But the Court held that, after such a lapse of time, it would presume that the recital in the original grant was correct, and (there being no one before it having an interest and calling upon it to do so) would not go into the question of the construction of the will.

This was an application for administration, with the will annexed, *de bonis non*, under the following circumstances:—

The testator died on the 16th of September, 1806, having made his will in the following terms:—"I give and be-"queath to my dear and beloved mother Charlotte Smith, "to the best of my knowledge and belief at present residing at "Telford, near Farnham, in the county of Surrey, England, "all my property, of whatsoever and every description, kind, "and denomination, which I may now or at any time possess "or have claim to on any account, having such full confidence "in her goodness, affection, and regard to my wishes, as to "believe and be persuaded that in the event of her surviving "me she will at her own free will and accord make the same "provisions from whatever property may fall to her on my ac-"count by virtue hereof, in favour of my dear and eldest "sister Charlotte Mary Smith, and of my dear brothers "Nicholas and Lionel Smith, as are hereafter expressed herein; "and in case it should please Almighty God to take from me "my dear and beloved mother, whereby the within provisions "of this will respecting her become null and useless, I then "and in such case do hereby will, publish, and declare, that I "give and bequeath to my dear and eldest sister Charlotte "Mary Smith, to the best of my knowledge and belief at pre-"sent residing at Telford near Farnham, in the county of "Surrey, England, and to my dear brother Nicholas Smith, to "the best of my knowledge and belief at present in the Civil "Service of the Honourable East India Company, and to my "dear brother Lionel Smith, to the best of my knowledge "and belief at present a lieutenant-colonel in the 18th or "Royal Irish Regiment of Foot, jointly to and equally among "and between them, all my property of whatever description

1861.
Nov. 19.

In the Goods of GEORGE AUGUSTUS FREDERICK SMITH.

"which I may be possessed of now, or have any claim to here-
"after. And I do hereby publish and declare it as my wish
"that any sum or sums of money that may devolve on my
"dear brother Nicholas Smith by virtue hereof, should be
"specifically appropriated to the use and service of my dear niece
"Lucena Smith, daughter of my dear brother Nicholas Smith,
"as long as she lives. In witness whereof, and to two other
"copies of this same tenor and date, I have hereunto sub-
"scribed my name and affixed my seal at Fort Amsterdam, in
"the colony of Surinam aforesaid, on this 10th day of June,
"in the year of our Lord 1806.

"GEORGE AUGUSTUS FREDERICK SMITH (L.S.)

"Signed, sealed, published, and declared by the said testator,
"as and for his last will and testament, in our presence, and
"at his request, and in the presence of each other, have here-
"unto subscribed our names as witnesses.

"J. GALLOWAY, Capt. 16th Regt.
"R. LYNCH, Capt. 13th Regt.
"SAML. WOOD, Lieut. 16th Regt."

The mother survived the testator a short time, and died intestate, without having taken out administration to the testator, and on the 19th of March, 1807, a grant of letters of administration, with the will annexed, was made to the said Charlotte Mary Smith by the Prerogative Court of Canterbury, as the natural and lawful sister, and one of the universal legatees substituted in the said will, having been first sworn duly to administer, no executor being named in the said will, and Charlotte Smith, widow, the natural and lawful mother and universal legatee for life named in the will, having survived the deceased, but died without taking out letters of administration, etc.

Charlotte Mary Smith intermeddled in the estate of the de-

1861. Nov. 19.

In the Goods of GEORGE AUGUSTUS FREDERICK SMITH.

ceased, but died leaving part thereof unadministered; she left a will, of which Lucena Smith, as executrix, took probate in July, 1842. A sum of money under some proceedings in Chancery had lately become due to the estate of the testator, and a personal representative was required to give a discharge; application was therefore made in the Registry for a grant, *de bonis non*, to Lucena Smith as a legatee for life, as to one third part of the residue of the said deceased's estate substituted in the said will. The Registrar objected that the original grant was improperly made; that the mother having survived the testator, the property vested absolutely in her, and the original grant should have been made to her representative. On the other hand, it was urged that the grant was properly made, as the terms of the will were such as a Court of Equity would hold to constitute a precatory trust, in favour of the sister and brothers, and that the mother had really no more than a life interest. (See 1 Jarman on Wills, p. 356, 3rd edit.)

The question now came before the Court on motion.

Dr. Swabey, after reciting the above circumstances, submitted that the first question was whether, after such a lapse of time, the Court would look behind a grant made by a competent Court, and which on its own recital was a proper one, there being no one before the Court having an interest and calling upon the Court to do so.

SIR C. CRESSWELL: I think that is the proper view to take of it. The cases on the interpretation of such terms run very fine, and I think I am not called upon now to question the propriety of the grant made by the Prerogative Court in 1807. The grant *de bonis non* may go as prayed.

1859.
May 10.

In the Goods of JOHN PARKER (deceased), on Motion.

In the Goods of JOHN PARKER.

Seaman's Will.—Informal Testamentary Paper.— 1 *Vict. c.* 26, *s.* 11.

The deceased, who was master of a trading vessel, in the course of a voyage, arrived at Port Adelaide, from whence he wrote, and forwarded by post a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea.

HELD, that the deceased was a mariner at sea, and consequently that such a letter, being in the handwriting of the deceased, and testamentary, was entitled to probate.

John Parker was the master and part owner of the ship called the 'Rolling Wave.' Accompanied by his wife, Ellen Parker, he sailed from Liverpool on the 3rd of July, 1857, bound for Adelaide, Australia, where he arrived on the 15th of October following. He afterwards sailed for Batavia and Hongkong, at which last place he arrived on the 22nd of February, 1858. The vessel, with the deceased on board, was afterwards despatched from China to Siam, *vid* Macao. It left Macao on the 15th of March, 1858; it was never afterwards heard of, and was supposed to have gone down with the deceased and all hands on board. The usual period of the voyage between Macao and Siam, at that time of year, is eighteen days. Before leaving England, John Parker made a will, dated the 24th of June, 1857. By this he named Joseph Swan and William Royals, executors and trustees, and left to them all his property in trust, as regards two thirds, for purposes immaterial to the present question; but as to one third, to pay the income arising therefrom to his mother Ann Parker for her life, and then to transfer that portion absolutely to his niece Sarah Ann Parker. In case the latter died under age, that portion, on the death of the mother, was to go absolutely to his brother Richard Parker. The will then continued:—"Provided also, and it is my will, that in case my said wife

1859. May 10.

In the Goods of JOHN PARKER.

"die in my lifetime, or we both die abroad or be drowned at "sea, then I direct my said trustees, or the survivor of them, "his heirs, executors, or administrators, or others, the trustees "or trustee for the time being of my will, to stand possessed "of the whole of the said trust-moneys and investment thereof, "upon trust to pay thereout a legacy to . . . and to pay and "divide the residue thereof unto and equally amongst such of "my said mother Ann Parker, sister Sarah Parker, and bro-"ther Richard Parker, and my nieces the said Sarah Ann "Parker, and Ellen Knowles and Alice Knowles, as shall be "then living." During the stay of the deceased in Australia, he wrote the following letter to Mr. and Mrs. Swan, the latter being the sister of Captain Parker's (the deceased) wife :—

"Port Adelaide, November 23, 1857.

"Dear Brother and Sister,—Had you seen my poor wife "cry last night, you would not have let her been so long "without hearing from you. I am going to Singapore, and "I hope and trust you will have me safely insured. I in-"close you a bill for £150, to present to the bank, to be "placed to my credit, and an order on the bank for cash to "defray expenses. In case of my ship being lost, and you "never hearing more of me or my wife, recollect I have wages "due from the 1st of May, £2. 10*s*. per cent. commission on "£1400 outward freight, and outward passage money £7. 10*s*. "I also send you vouchers to be preserved for me in case I "live, or for you to settle my accounts if I die. Thinking, "through not hearing from you, that something serious has "happened, I have wrote to Royals. I beg of you, if you "find any difficulty in getting this money, that you will see "Mr. Flett, and he will be able to make it all right at the "bank.

"Mem.—I desire, if it should please God to take me before "I see you again, that you and Mr. Royals will prevent my "brother Richard, or his children, from ever having a fraction

1859.
May 10.

In the Goods of JOHN PARKER.

"of my property after my mother's death; he is a great black-
"guard; he has distinctly refused to allow his mother a far-
"thing. God bless you all. In great haste,

"Your brother and sister,

"J. and E. PARKER."

Directed:—"MR. JOSEPH SWAN,
"Church Road,
"Higher Tranmere,
"Cheshire, England."

Post-mark:—"Adelaide, Nov. 23, 1857."

There was no direct evidence that Captain Parker was on board his ship when he wrote this letter; but it is dated Port Adelaide.

Dr. Middleton submitted that the letter was testamentary, inasmuch as it varied the disposition of property made by the will of the deceased, and was intended to operate on his death, and that the deceased was a mariner at sea; (*In the Goods of Lay*, 2 Curt. 375; *In the Goods of Milligan*, 2 Robert, 108;) and as it was in the deceased's handwriting, the letter must be admitted to probate.

SIR C. CRESSWELL: The only difficulty I have is in granting probate to a letter, the larger portion of which is not testamentary. On the authority, however, of the last case referred to (*In the Goods of Milligan*), in which a similar document was admitted, I feel bound to grant the motion, and to decree probate of the will, and of the letter, dated Port Adelaide, November 23, 1857, as a codicil thereto, to the executors.

1860.
January 25.

CLARKSON v. WATERHOUSE.

CLARKSON v. WATERHOUSE.

A Married Woman.—Liability for Costs.—Practice.

Where a will was propounded by a married woman, and her husband had not been joined with her as a party to the suit, the Court having pronounced against the will, condemned the wife in the costs.

This was a suit for the revocation of probate of the will of Jane Clarkson, which had been granted by the District Registry, at York, to her daughter, Mrs. Mary Waterhouse, the defendant. The probate had been called in by her brother, William Clarkson, the plaintiff, and she then propounded the will. The plaintiff filed a plea, alleging undue execution, upon which issue was joined.

The will, on the face of it, appeared to have been duly executed. The attesting witnesses were Elizabeth Bell, the daughter, and Elizabeth Bell, the grand-daughter of the deceased. Elizabeth Bell the younger, at the request of Mrs. Waterhouse, made the usual affidavit of due execution, and probate in common form was thereupon issued at York.

On her examination in Court, she stated that this affidavit was untrue; that although she was present when the deceased signed the will, Elizabeth Bell the elder was not; that Banks, who had prepared the will, wrote her mother's name in the attestation clause, and that this was known to Mrs. Waterhouse when she asked her to make the affidavit. This statement was confirmed by Elizabeth Bell the elder.

SIR C. CRESSWELL pronounced against the will.

Dr. Swabey, for the plaintiff, applied for the defendant to be condemned in costs.

Dr. Spinks, contrà: Mrs. Waterhouse is a married woman.

The plaintiff has not made her husband a party to the suit; she is therefore not liable to be condemned in costs.

Cur. adv. vult.

1860.
January 25.

CLARKSON
v.
WATERHOUSE.

SIR C. CRESSWELL: The defendant, Mrs. Waterhouse, acted with great impropriety in obtaining probate of a will at York, which she well knew had not been duly executed. Her niece, Elizabeth Bell the younger, evidently made the affidavit of due execution under some misapprehension; for I shrink from imputing to her that she wilfully swore what she knew to be false. On my pronouncing against the will, there arose a question of costs. I was disposed to grant them to the plaintiff, when Dr. Spinks interposed an objection that I could not do so, on the ground that Mrs. Waterhouse was a married woman, and that her husband had not been made a party to the suit. I have looked into the cases, and although I think it extremely probable that this neglect of the plaintiff will render fruitless the order I am about to make, yet I find that there is abundant authority in the Common Law Courts for my making an order for her to pay the costs. In *Newton and Wife* v. *Boodle*,[1] the plaintiffs obtained a rule *nisi* for a new trial, which was discharged with costs against both the plaintiffs. The female plaintiff obtained a rule *nisi* to amend that rule by striking out so much of it as directed costs to be paid by her, on the ground that she being a married woman suing with her husband was not liable to costs. This rule so obtained by the wife was afterwards discharged, and the Court thought it ought to be discharged with costs. Then the question arose, who was to pay these costs? But the Court held, that the order for their payment ought to be made against the wife. If the wife has no separate property, I do not know that the order can be enforced; if she has separate property, there may be some mode of getting the costs from her.

[1] 4 Com. B. 359.

1860. January 25.

CLARKSON v. WATERHOUSE.

At all events, I shall pronounce an order that the defendant be condemned in costs.

February 16.

BAKER v. BAKER.

BAKER v. BAKER.

Attachment.—Married Woman.—Administratrix.

An attachment will be granted against a married woman for non-compliance with a citation, calling upon her to file an inventory in the Registry of an estate of which she is administratrix.

In December, 1858, the defendant took out letters of administration to the effects of her deceased husband. In 1859 she was served with a citation on behalf of his mother and sister, calling upon her to bring in an account, and to file an inventory of his estate and effects in the Registry. She had not obeyed the citation: after its service she remarried.

Mr. E. Ward moved for an an attachment against her, or against her husband.

SIR C. CRESSWELL: You may take an attachment against the wife. I cannot grant one against the husband. He is responsible for her debts, but he is not responsible for her delinquencies. *Attachment granted.*

1861. November 26.

In the Goods of CHARLES CLARKINGTON, deceased (on Motion).

In the Goods of CHARLES CLARKINGTON.

Limited Administration ad colligenda bona.—*Power of Administrator.*

The Court, under special circumstances, made a grant to a creditor *ad colligenda bona*, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises which would expire before a general grant could be made.

The Court refused to include in the grant a power to dispose of the lease and goodwill of the business, or a power to carry on the business.

1861. November 26.

In the Goods o CHARLES CLARKINGTON.

Charles Clarkington, late of No. 246 and 248, Regent Street, photographic artist, died on the 28th of October, 1861, intestate, and leaving as it was supposed, no known relation.

The deceased's personal and only property consisted of the lease of the said premises in Regent Street, the benefit of the covenant to renew the said lease, certain furniture and fixtures, his stock in trade, the apparatus used in his business, and debts due to him; altogether of the estimated value of £786. His liabilities far exceeded this amount; but as there was a prospect of realizing a considerable sum by the sale of the goodwill of his business, for the purchase of which several parties were willing to treat, it was expected that by the careful management of the estate, the assets, when realized, would be sufficient to pay his liabilities in full. The lease of the business premises would expire on the 22nd of December, 1861, and it was necessary that there should be an administrator appointed without delay, for the purpose of collecting the deceased's debts, of renewing the lease, and of making arrangements for the carrying on or sale of the business. A citation had been extracted from the Registry, against the next of kin of the deceased (if any), and all other persons in general to accept or refuse letters of administration of his effects, or to show cause why the same should not be granted to Mr. Frederick Thorn, as a creditor. The citation had been served on the Queen's Proctor, and an abstract of it had been inserted in the 'Times' newspaper of November the 19th. But as the grant could not be made to Mr. Thorn until thirty days after the service of the citation, the present application was made.

Dr. Phillimore, Q. C. (*Dr. Tristram* with him) moved the

1861. November 26.

In the Goods of CHARLES CLARKINGTON.

Court for a grant of administration of the effects of the deceased to be made to Mr. Thorn, *ad colligenda bona*, limited to the collection of all the personal property of the deceased, and giving discharges for all the debts due to his estate on the payment of the same, with a power to renew the lease and to dispose of his business premises and of the goodwill of his business. In the goods of *Mary Radnall*, 2 Add. 233, a grant had been made, which although not in precise terms so extensive as the one now asked for, yet after authorizing the administrator to collect the property and to give discharges for the debts, empowered him "to do what further was necessary for the preservation of the property." The Prerogative Court had also made a grant *ad colligenda bona*, *In the goods of George White* (1832), limited to the sale of a ship, and to the protection of a cargo, and other matters relating thereto (*not reported*), Coote's Probate Practice, p. 114. There were affidavits filed by two creditors, who had claims on the estate to the amount of nearly £1000 in support of this application.

SIR C. CRESSWELL: I will make a grant limited to the collection of the personal estate of the deceased, with a power to the administrator to give discharges for his debts on payment of the same, and to renew the lease. I cannot go further. I am informed by the Registrar that there is no precedent in the Prerogative Court which would warrant me in giving the administrator a power to dispose of the premises and of the goodwill of the business.

Dr. Phillimore asked that the grant should include a power to the administrator to carry on the business.

SIR C. CRESSWELL declined to insert this power in the grant.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

(*Before the* JUDGE ORDINARY.)

1861.
March 13.

BUSBY
v.
BUSBY AND
VINE.

BUSBY *v.* BUSBY and VINE.

Costs.—Attachment for Non-payment of.—Affidavit of Service of Order.

An attachment will not be granted for non-payment of costs pursuant to an order, unless a copy of the order be annexed to the affidavit of service.

Mr. Searle moved for an attachment against the petitioner for non-payment of costs pursuant to an order of the Court.

The JUDGE ORDINARY: A copy of the order served should be annexed to the affidavit of service. Until this is done I cannot grant an attachment.

Motion rejected

April 17.

BROCAS
v.
BROCAS.

BROCAS *v.* BROCAS.

Dissolution of Marriage.—Abatement by death of parties.—Practice.

A petition for dissolution of marriage abates on the death of the re-

1861.
April 17.

BROCAS
v.
BROCAS.

spondent, but the Court will not, on the application of the petitioner, order that the petition and affidavit in support be removed from the file.

This was a suit by a wife for dissolution of marriage. The respondent did not appear. The petition came on for proof on the 19th of March, but, in consequence of the illness of the respondent, the hearing was postponed. Three days afterwards he died.

Dr. Spinks, for the petitioner, now moved for an order that the petition and the affidavit in support of it, should be taken off the file.

The JUDGE ORDINARY: By the death of the respondent the suit abated. I think, however, that the petition should remain on the file.

Dr. Spinks asked for an order that the cause should be removed from the cause list.

The JUDGE ORDINARY: On an affidavit being filed that the respondent is dead, the Registrar will remove it from the cause list, but I make no order.

Motion rejected.

April 24.

STOATE
v.
STOATE.

STOATE *v.* STOATE.

Decree nisi *for Dissolution of Marriage.—Right of Respondent under* 23 *&* 24 *Vict. c.* 144, *s.* 7.

A respondent, against whom a decree *nisi* for dissolution of marriage has been pronounced, cannot show cause against the decree being made absolute under Sect. 7 of 23 and 24 Vict. c. 144.

In this case a decree *nisi* had been pronounced for dissolu-

tion of the marriage on the ground of the adultery of the wife. The respondent had appeared.

1861.
April 24.

STOATE v. STOATE.

Dr. Swabey now moved that the respondent might be allowed, under Sect. 7 of the 23rd and 24th Vict. c. 144, to show cause against the decree being made absolute. Under that section a respondent ought to be at liberty to show cause against the decree *nisi* being made absolute, if material facts arise or come to her knowledge after the decree *nisi* has been pronounced.

The JUDGE ORDINARY: The respondent has no right under that section to show cause against the decree *nisi* being made absolute. She should have applied for a new trial. The motion must be rejected, and the costs of it must not be allowed against the husband.

Motion rejected.

ALEXANDER *v.* ALEXANDER.

May 15.

ALEXANDER v. ALEXANDER.

Decree for Restitution of Conjugal Rights.—Attachment for Disobedience.—Practice.

A husband who has been served with a decree in a suit for restitution of conjugal rights, ordering him to take his wife home, is bound to take the first step, by inviting her to return to him. If he does not, an attachment will be issued. If he has not appeared in the suit, notice of the motion for an attachment is not requisite.

This was a petition by a wife for a restitution of conjugal rights. The husband did not appear, though personally served. On the 15th of January, 1861, the petition came on for proof before the Judge Ordinary, who made a decree for restitution

1861. May 15.

ALEXANDER. v. ALEXANDER.

of conjugal rights. By the decree the husband was ordered, within a month after the service of the decree upon him, to take the petitioner home, and treat her with conjugal affection, and to certify to the Court at its next sitting after the expiration of the said month that he had done so, etc.

On the 16th of February, 1861, an office copy of the decree under the seal of the Court, was personally served on the respondent at Dinan, in France; but he had not taken the petitioner home.

Dr. Spinks, on behalf of the petitioner, now moved for an order that an attachment should issue against the respondent for disobeying the decree upon an affidavit of the petitioner that the respondent had neither by himself or his agents had any communication with her since the service of the decree; that he had not taken her home, or made any offer to her of an home, and that she believed he had gone out of the jurisdiction of the Court for the purpose of defeating the proceedings. There were also affidavits of service of the copy of the decree, and that search had been made, but there was no entry in the book kept in the Registry for that purpose of a certificate that he had complied with the decree.

The JUDGE ORDINARY: Has the respondent had any opportunity of taking his wife home? He is in France and she is in England. Should she not have tendered herself to be taken home; and, in analogy to the practice of the Ecclesiastical Court, should he not have had notice of this motion?

Dr. Spinks: He has not appeared, and therefore no notice is necessary. In the Ecclesiastical Courts the husband would have been pronounced in contempt, and the Court would then have ordered that a *significavit* to the Court of Chancery should issue.

The JUDGE ORDINARY: I am informed by the Registrar

that in the Ecclesiastical Courts, when in a suit for restitution of conjugal rights a husband had been personally served with an order to take his wife home, it was not requisite that the wife should make an offer to return home, but that the husband ought to have taken the first step by inviting her to do so. An attachment may therefore issue.

1861. May 15. ALEXANDER v. ALEXANDER.

Attachment granted.

AFFORD *v.* AFFORD.

May 25. AFFORD v. AFFORD.

Costs.—Wife suing in formâ pauperis *allowed Costs.*

A wife suing *in formâ pauperis* for a dissolution of marriage, if she obtains a decree is entitled to costs.

This was a petition by a wife who sued *in formâ pauperis* for dissolution of marriage on the ground of adultery and desertion. The respondent did not appear. The petition now came on for hearing, and the Judge Ordinary having pronounced a decree *nisi* for dissolution of marriage,

Dr. Swabey asked that the husband should be condemned in costs.

The JUDGE ORDINARY: I see no reason why the petitioner should not have her costs.

Decree nisi *with costs.*

1861.
May 30.

WHIELDON v. WHIELDON.

Permanent Alimony.—Children in Wife's custody.

WHIELDON v. WHIELDON.

Where a wife had obtained a decree of judicial separation, and the Court had ordered that she should have the custody of three children all under the age of seven, alimony *pendente lite* having been allotted on the assumption that the husband's income was £400 per annum, the Court allotted to the wife £160 per annum as permanent alimony; £100 for herself, and £20 per annum for each of the children.

In this case a decree of judicial separation on the ground of adultery of the husband had been pronounced, and the Court had ordered that the petitioner should have the custody of the three children of the marriage, who were all under seven years of age.

Dr. Phillimore, Q.C., moved that permanent alimony should be allotted. Alimony *pendente lite* was allotted, the income of the husband being taken to be £400. The circumstance that the wife has the children to maintain should be taken into consideration.

Dr. Deane, Q.C., for the petitioner.

The JUDGE ORDINARY allotted £160 as permanent alimony; £100 for the wife, and £20 for each of the children.

ASHLEY v. ASHLEY.

ASHLEY v. ASHLEY.

Practice.—Withdrawing Petition for Judicial Separation by Wife, and filing one for Dissolution of Marriage.—Wife's Costs.

The Court will allow a wife to withdraw her petition for judicial sepa-

ration and file one for dissolution of marriage, if her proctor has not received from the husband her costs in the former suit.

1861. May 30.

ASHLEY v. ASHLEY.

This was a suit by a wife for judicial separation on the ground of cruelty.

Mr. E. Clarkson, on behalf of the petitioner, moved that Mrs. Ashley might be at liberty to withdraw her petition for judicial separation and file one for dissolution of marriage, on the ground of cruelty and adultery. The husband's adultery had only been discovered since the former suit was commenced.

The JUDGE ORDINARY: Has the wife's proctor received her costs in the former suit?

Mr. E. Clarkson: No.

The JUDGE ORDINARY: That being so, I will grant the application.

Motion granted.

POUNSFORD *v.* POUNSFORD AND BULPIN.

June 10 & 12.

POUNSFORD v. POUNSFORD AND BULPIN.

Dissolution of Marriage.—Damages.—Immediate Execution.—Order to pay Damages into Court.

The Court has no power to order immediate execution for the recovery of damages awarded against the co-respondent, and ordered to be paid to the petitioner, nor to order that such damages be paid into Court.

This was a petition for dissolution of marriage, with a prayer asking damages against the co-respondent. The respondent denied the adultery. The co-respondent did not appear. On the 10th of June, 1861, the cause was tried by a jury, who

1861. June 10 & 12.

POUNSFORD v. POUNSFORD AND BULPIN.

found that the respondent had committed adultery, and assessed the damages at £500, and the Judge Ordinary, on the application of the counsel for the petitioner, who stated that the wife had separate property, and that the husband was without means, ordered that the damages should be paid to the husband.

Dr. Spinks (*Mr. J. D. Coleridge* with him) then applied for immediate execution against the co-respondent.

The JUDGE ORDINARY said that he had no power to order immediate execution, but that the motion might be renewed.

Dr. Spinks now moved the Court to order immediate execution, and that the £500 should be paid into Court to abide the event of the suit upon an affidavit that the co-respondent was selling off his property, and was about to go abroad.

The JUDGE ORDINARY: I do not see what power I have to make the order.

Dr. Spinks: If this had been an action for *crim. con.*, immediate execution might have been granted.

The JUDGE ORDINARY: I do not see what execution I could issue. I have only such power to enforce decrees as the Court of Chancery has.

Dr. Spinks: You have decreed that the damages should be paid to the petitioner.

The JUDGE ORDINARY: Yes; that means when he can get them. I should be glad to assist the petitioner if I could, but I do not see that I can.

Motion rejected.

1861.
July 3.

CLOUT
v.
CLOUT AND HOLLEBONE.

CLOUT *v.* CLOUT AND HOLLEBONE.

Dissolution of Marriage on the ground of Wife's Adultery.—Access to the Children.—20 & 21 *Vict. c.* 85, *s.* 35.

After a decree *nisi* for dissolution of marriage on the ground of the wife's adultery, the Court will not order that she have access to the children of the marriage.

In this case, on the 8th of June, 1861, after a verdict of a jury, the Judge Ordinary pronounced a decree *nisi* for dissolution of marriage, on the ground of the adultery of the wife.

Dr. Wambey subsequently, on behalf of the respondent, asked the Court to order that she should have access to two children of the marriage.

Cur. adv. vult.

The JUDGE ORDINARY: This was an application on behalf of the wife against whom a decree *nisi* for dissolution of marriage had been pronounced, on the ground of her adultery, that she might have access to the children of the marriage. The application being of a novel character required some consideration. By the 4th section of 2 & 3 Vict. c. 54, which empowers the Lord Chancellor or the Master of the Rolls to order that a mother should have access to infant children, and if such children be within the age of seven years, to order that they be delivered to and remain in her custody until attaining such age, it is enacted "That no order shall be made "by virtue of this Act whereby any mother against whom "adultery shall be established by judgment in an action for "criminal conversation at a suit of her husband, or by the "sentence of an Ecclesiastical Court, shall have the custody of "an infant, or access to any infant, anything herein contained "to the contrary notwithstanding." I think that that enact-

1861. July 3.

CLOUT v. CLOUT AND HOLLEBONE.

ment establishes a precedent that I ought to follow, and that when a wife has been proved guilty of adultery, I ought not to order that she have access to her children. I must therefore refuse to grant the application.

Motion rejected.

July 11.

BENT v. BENT AND FOOTMAN.

BENT v. BENT AND FOOTMAN.

Damages.—Dissolution of Marriage.—Provision for Adultress. —Custody of Children.—20 & 21 *Vict. c.* 85, *ss.* 32, 35.

On a decree *nisi* for dissolution of marriage on the ground of the adultery of a wife who on her marriage had a fortune of £1,678, which was not settled, but was received by the husband, the Court ordered that the husband should settle £1,000 upon trust that the interest be applied for the benefit of the wife so long as she conducted herself properly and remained unmarried, and that upon her interest ceasing the fund should be held in trust for the children of the marriage in equal shares, and that the £1,000 damages awarded against the co-respondent, should be paid to the husband in lieu of the sum he would have to settle, and that the decree should be suspended until the settlement should be made.

When a marriage is dissolved on the ground of the wife's adultery, the Court will not order that she have the custody of or access to the children of the marriage.

This was a petition for dissolution of marriage on the ground of the adultery of the wife. The petitioner claimed damages. The respondent and co-respondent denied the adultery. On the 3rd of July, 1861, these issues were tried before the Judge Ordinary by a jury, who found them in favour of the petitioner, and assessed the damages at £1,000. The Judge Ordinary suspended the decree *nisi*, in order that application might be made as to the way in which the damages should be applied, and also as to the petitioner making some provision for the respondent.

1861.
July 11.

BENT
v.
BENT AND FOOTMAN.

Dr. Phillimore (*Mr. G. H. Cooper* with him), on behalf of the respondent, now moved the Court—1st, under the 32nd section of 20 & 21 Vict. c. 85, to order the petitioner to secure to the respondent such gross sum of money, or such annual sum of money as the Court shall deem reasonable; 2ndly, under the 35th section, to order that the respondent should have access to the two elder children of the marriage, boys of the respective ages of seven and six, and that she should have the custody of or access to the youngest child, a girl aged five. The motions were grounded on affidavits, which stated that on the marriage, which took place in October, 1852, the respondent was possessed of the sum of £1,678; that the petitioner had received this, and that no settlement of it had been made; that alimony *pendente lite* had been allotted at the rate of £48 per annum; that the respondent had no property or means of subsistence; that all intercourse between the respondent and co-respondent had ceased, and that the latter was residing with his wife. He submitted that it would be reasonable that a sum equivalent to the respondent's fortune should be settled by the petitioner, so that she might receive the annual income thereof during her life, with a power to her to dispose of a portion of it. He referred to *Keats* v. *Keats and Montezuma*,[1] and also asked that the respondent might have access to the two elder children, and the custody of, or access to, the youngest child.

Mr. Pulling (*Dr. Deane*, Q.C., with him), for the petitioner, said that the petitioner did not wish to deal harshly with the respondent, and would leave it to the Court to make such order as it thought fit. The petitioner, however, objected to the settlement proposed on behalf of the respondent, and would prefer that the interest on the sum of £1,000 damages should be settled upon the petitioner for her life, and afterwards upon the children of her marriage. He also asked for an order that the £1,000 damages be paid the petitioner.

[1] 1 Swab. & Trist. 358.

1861. July 11.

BENT v. BENT AND FOOTMAN.

THE JUDGE ORDINARY: I think the proper order to make will be, that the petitioner settle the sum of £1,000 to be invested in the names of trustees, upon trust that the interest be applied for the benefit of the respondent so long as she conducts herself properly and remains unmarried, and that after her interest ceases, the fund be held in trust for the children of the marriage in equal shares; that the £1,000 damages awarded by the Jury be paid to the petitioner in lieu of the £1,000 he will have to settle, and that the decree for the dissolution of the marriage be suspended until the settlement has been made. As to the respondent's application with regard to the children, I had occasion to consider the subject lately. I must decline to order that a wife who has been proved to have been guilty of adultery have access to, or the custody of, the children of the marriage.

Dr. Phillimore then asked that the petitioner be ordered to pay the respondent's costs of the motion.

THE JUDGE ORDINARY: The expense of the settlement must be paid by the petitioner; but I shall make no order as to the costs of the motion.

Order accordingly.

July 3.

LEWIS v. LEWIS.

LEWIS *v.* LEWIS.

Dissolution of Marriage.—Renewal of Cohabitation after Decree Nisi.—*Dismissing Petition.—Stay of Proceedings.*—23 & 24 *Vict. c.* 144, *s.* 7.—*Quære, whether the Court at the instance of the parties can Dismiss a Petition for Dissolution of Marriage after a Decree* Nisi *has been pronounced.*

After a decree *nisi* for dissolution of marriage at the suit of the wife had been pronounced, the wife renewed marital intercourse with her husband, and informed her attorney that she did not wish any further proceedings to be taken in the suit.

Upon an application by the husband to dismiss the petition, the Court declined to accede to it, but said that, if both parties consented, it would order all proceedings in the suit to be stayed. 1861. July 8.

LEWIS v. LEWIS.

This was a suit by a wife for dissolution of marriage, on the ground of adultery and cruelty. The respondent denied the charges, and also pleaded condonation.

These issues were tried before the Judge Ordinary by a jury, and were found for the petitioner, and a decree *nisi* for dissolution of marriage was pronounced. March 11.

Mr. Hannen moved that the decree *nisi* should be made absolute. June 19.

Mr. C. H. Hopwood, for the respondent, asked the Court to postpone making the decree absolute, to afford an opportunity of communicating with the Queen's Proctor upon an affidavit of the respondent, which stated, in substance, that since the decree *nisi* had been pronounced, the petitioner had condoned the misconduct charged in the petition, by renewing connubial intercourse with the respondent upon two occasions. It would be contrary to the policy of the Act to dissolve the marriage under such circumstances.

THE JUDGE ORDINARY: This affidavit shows no ground for the interposition of the Queen's Proctor. It states something that has taken place since the decree *nisi* was pronounced. I shall therefore not make the decree absolute until some inquiry has been made. Let the motion stand over till next Wednesday.

Mr. Hannen, for the petitioner, read an affidavit made by the clerk to the petitioner's attorney, in which he stated that on the 19th of June last he wrote to the petitioner informing her what had taken place in Court on that day, and asking for an explanation, and that he afterwards called upon her, when she said that her husband's statement was true, and that she had June 26.

1861. July 8. LEWIS v. LEWIS.

slept with him two nights consecutively; that she had forgiven him, and did not wish any further proceedings to be taken against him.—Under these circumstances he should leave the matter to be dealt with by the Court as it may think fit.

Mr. W. Brandt, for the respondent, prayed the Court to dismiss the petition. Neither the 23 & 24 Vict. c. 144, nor the rules under it, provide for such a case. It is not clear that, if the Court abstains from action, the petitioner may not hereafter ask that the decree be made absolute. Until the decree is made absolute the position of the parties is analogous to that of parties divorced *à mensa et thoro* by the sentence of an Ecclesiastical Court, who were separated only until they should be reconciled. The wife, by renewing connubial intercourse, has disentitled herself from taking further proceedings in the suit.

THE JUDGE ORDINARY: What power have I to dismiss a petition at the instance of the petitioner after a decree *nisi* has been pronounced?

Mr. W. Brandt: If the Court has not power to dismiss the petition, it may retain it for the purpose of the suit, but dismiss the parties. The petitioner has obtained a verdict that her husband has been guilty of adultery and cruelty, and the Court knows that his misconduct has been condoned. The suit must be considered to be going on until the decree is made absolute.

THE JUDGE ORDINARY: There is nothing to show that the decree *nisi* was not a proper decree. When it was pronounced the respondent's adultery and cruelty were proved, and there was nothing to show that the petitioner was not entitled to a decree. *Cur. adv. vult.*

THE JUDGE ORDINARY now said: This case is in a rather

singular position. The petitioner being entitled to a dissolution of her marriage, a decree *nisi* was pronounced. When the motion to make it absolute came on, the husband interposed, and stated that he and his wife had made up their differences, and had renewed matrimonial cohabitation, and therefore applied to have the petition dismissed. It appeared from an affidavit of the clerk to the attorney of the petitioner that he wrote to her, stating what had passed in Court, that she admitted the truth of her husband's statement, that she had forgiven him, and had since slept with him, and she desired that no further proceedings should be taken in the matter. Her attorney does not, however, appear to consent that the proceedings should be stayed. I doubt much whether after a decree *nisi* has been pronounced, I can dismiss the petition at the instance of either of the parties to the suit; but if the petitioner, either by her attorney or in person, applies to the Court, I will, at the desire of both parties, make an order that no further proceedings be taken in the cause. All proceedings in the suit will then be stayed. I doubt whether the Court has power to dismiss a petition for dissolution of marriage after a decree *nisi* has been pronounced, except in the manner pointed out by 23 & 24 Vict. c. 144, s. 7, viz. at the instance of the Queen's Proctor or of a third person.

1861.
July 8.

LEWIS
v.
LEWIS.

(*Before the* JUDGE ORDINARY.)

SMALLWOOD *v.* SMALLWOOD.

November 12.

SMALLWOOD
v.
SMALLWOOD.

Judicial Separation.—Cruelty.—Personal Violence.

A single act of personal violence by the husband towards the wife, not producing any considerable injury to the person and not repeated, is not, though unwarrantable, sufficient to found a decree of judicial separation.

Lapse of time between the act complained of and the commencement

1861. November 12.

of the suit is not a bar to such a suit, but will weigh with Court in determining the character of the violence proved.

SMALLWOOD v. SMALLWOOD.

This was a petition for judicial separation at the suit of the wife on the ground of cruelty.

The case was heard before the Judge Ordinary in the sittings after Trinity Term, and was conducted by

Dr. Twiss, Q.C., and *Dr. Tristram* for the petitioner.

Dr. Swabey for the respondent.

The only question was, whether the act of violence proved was legal cruelty. The result of the evidence is sufficiently stated in the judgment. *Cur. adv. vult.*

Nov. 12.

THE JUDGE ORDINARY gave the following judgment: This was a petition for judicial separation on the ground of cruelty.

The petition alleged that the parties were married in 1836; that in September, 1848, the respondent was guilty of cruelty by springing forcibly upon her, throwing her down, placing his hand on her throat, and nearly strangling her; that in consequence she withdrew from cohabitation with him, and always refused to renew it, although he frequently solicited her to do so. The respondent denied the cruelty alleged, and charged the petitioner with violence towards him; but the case turns upon the sufficiency of the evidence given in support of the petition.

The petitioner on her own behalf deposed that she married the respondent in 1836 without the knowledge of her friends, the respondent having some employment in the British Museum; that she was reconciled to her mother in the same year; that some money afterwards came to her, the greater part of which was lost by the respondent in various speculations; but the residue, £850, was settled upon her; that in 1842 her mother took a house for them at North-end, Hampstead, where she opened a school, which prospered, and by the profits

of which she maintained herself and family; that in the autumn of 1848 the respondent became jealous of a medical man named Williams, who attended the children in the school, and he frequently taunted her with infidelity; that on one occasion, in September, 1848, he returned from a walk, called her into the drawing-room to him, and renewed his accusation of too great intimacy with Williams, which she denied; that he then took her by the throat, and, after shaking her violently, threw her on the ground against the drawing-room door; that a female servant hearing the noise rushed in, and he jumped out of the window; that she (petitioner) then became insensible. This servant died two years ago. That on coming to herself she sent for a neighbour, Mr. Tatham, to come and mediate or adjudicate between them; that he came and arranged that they should live separate, although under the same roof; that they continued to live in that way till November, 1848, when he went away and never came back to live there; that she continued to live there till September, 1849; that the school was afterwards broken up in consequence of the respondent having become bankrupt in the preceding month of August, which she considered he did on purpose to break up the school; that at Christmas, 1849, she went to her mother's house at the breaking up of the school for the holidays, on account of his interference and determination to break up the establishment; that after the bankruptcy Mr. Graham (her brother-in-law) took the school, and permitted her to conduct it, and that she had carried it on in that manner ever since, and by so doing had supported herself and her children.

Mr. Tatham, the person mentioned by the petitioner in her evidence, was called on her behalf, and proved that in the autumn of 1848 the respondent called upon him several times, and stated that he feared an improper intimacy existed between Mr. Williams and his wife. The witness assured him he did not believe it, and advised him not to mention it to any person, as it would injure the school, but to watch and ascertain whether

1861. November 12.

SMALLWOOD v. SMALLWOOD.

his suspicions were well founded or not; that he afterwards received a note from the petitioner, stating that her husband had treated her in a very violent way. In a quarter of an hour afterwards the respondent called and requested him, as a mutual friend, to come to his house, which he did. He there saw the petitioner alone; she was very indignant at the charge made against her, and said that unless her husband admitted its falsehood, she would have nothing more to do with him. The witness suggested that Mr. Williams should not continue to attend the pupils, in which she acquiesced. In the course of the conversation she said that the respondent attempted to strangle her, and that she was so much afraid of her life that she would go to her brother-in-law. But it did not appear that she ever did so. The witness then proceeded: "I saw "him afterwards, and explained what had passed. He seemed "satisfied with her determination to get rid of Williams's at- "tendance. I told him what she said about his violence. He "admitted that he acted under great 'irritation at the time.'" About a fortnight afterwards the respondent called upon the witness in great excitement about a note addressed by Williams to the petitioner in terms which he considered too familiar—"My dear Mrs. Smallwood"—although there was nothing else objectionable in the contents of the note. The witness believed that the respondent did not remain at the house long after that time, but the transaction having occurred so long ago he would not undertake to speak precisely as to dates.

Mr. Graham, the petitioner's brother-in-law and trustee, was examined, but gave no evidence as to the violence. He believed that the respondent ceased to be an inmate of the house where the school was kept in September, 1848, but would not undertake to speak positively as to dates. He added, "I re- "member that she refused to live with him after his endea- "vours to calumniate her character."

In addition to this evidence some letters written by the respondent were put in, stating in strong terms his regret at

having injured his wife, and begging forgiveness. It is unnecessary to notice their contents particularly, for I think they must be taken to refer to an injury by unfounded accusations and not by violence.

It was contended for the respondent that after so long an interval between the alleged injury and the petition, the Court would not be warranted in fouding a decree of judicial separation on such slight evidence. On the other hand, it was urged that the evidence would have been sufficient had the suit been instituted *recenti facto*, and must therefore be equally effectual now; and *Saunders* v. *Saunders*, 1 Rob. 549; *Lockwood* v. *Lockwood*, 2 Curt. 281; and *Smith* v. *Smith*, 2 Phil. 212, were cited as instances where the Court had interfered to protect a wife upon what might be deemed rather slender evidence of bodily injury. I cannot agree that the lapse of time is immaterial; if at the time there had been any serious apprehension of further violence on the part of the husband I cannot but suppose that means would have been found to claim the protection of the Ecclesiastical Court. Still I have no proof before me of any indirect motive for the present proceeding, and do not by any means treat the lapse of time as a bar.

I will therefore consider the case as if the transaction had been recent. The violence consisted of one act only. No blow was given. An altercation arose out of the husband's suspicions, and then he took her by the throat, shook her, and threw her down. It does not appear that any marks were left on the throat, or that she was rendered ill by the transaction. She told Mr. Tatham that she was afraid, and should go to her brother-in-law's house, but did not do so; nor does it appear that any complaint was made to that gentleman; and from his evidence, and that of Mr. Tatham, I infer that she refused further cohabitation with her husband, not on account of his cruelty, but on account of the unfounded accusation. The ultimate departure of the respondent from the house did not

1861. November 12.

SMALLWOOD v. SMALLWOOD.

take place until he again complained of undue familiarity on the part of Mr. Williams in writing to the petitioner.

That the conduct of the respondent was unwarrantable is true, but I have examined the cases referred to, and find in each of them not merely one violent act committed under excitement, and not producing any considerable injury to the person, but repeated acts, furnishing such evidence of *sævitia* as warranted the Court in concluding that the wife could not cohabit in safety with such a husband, and was therefore entitled to the protection of the Court. It was candidly admitted by Dr. Twiss that those cases exhibit the minimum of evidence of cruelty upon which the Ecclesiastical Court ever founded a decree; the evidence in this case seems to me to fall short of that which the Court in each of those instances had before it; and I feel bound to reject the prayer of the petition, which must accordingly be dismissed.

November 13.

THOMPSON v. THOMPSON AND STURMFELLS.

(*Before the Full Court,*—THE JUDGE ORDINARY, KEATING, J., *and* WILDE, B. *Appeal from the Judge Ordinary.*)

THOMPSON *v.* THOMPSON AND STURMFELLS.

Access to Children.—Jurisdiction of Court.—20 & 21 *Vict. c.* 85, *s.* 35.—*Discretion.*

The Court has power to make an order for access merely of one of the parties to a suit to the children *pendente lite.*

On appeal from an interlocutory matter, not touching the main issue in the cause, and resting in the judicial discretion of the Court below, the appellant must satisfy the Court of Appeal that the discretion of the Court below was altogether wrongly exercised.

This was an appeal from a refusal of the Judge Ordinary to make an order for access of the wife to the children pending suit. The petition was by the husband for dissolution of the

marriage by reason of the wife's adultery. The children of the marriage were two girls, aged respectively about two years and a half, and one year and a half. On the 30th of May, the original motion on behalf of the wife for access was made, and was adjourned for further affidavits from both parties as to the then circumstances till the 19th of June, when it appeared that the children were under the roof and in the care of the husband's mother, he being a man of small means, and his wife, of course, owing to the suit, being absent from his house. It appeared that the wife and her mother-in-law and sister-in-law were not on good terms, and high words, at least, had passed between them. It was suggested that if the mother had access to the children elsewhere, any quarrel or violence might be avoided. Under the circumstances,

THE JUDGE ORDINARY refused to make any order in the matter, intimating that it might be a question whether he had any power to make an order for access merely when no question as to the custody of the children was before the Court.

From this refusal an appeal was brought to the full Court. The particular circumstances of the case were of little or no interest, but the question of the power of the Court to make an order for mere access was decided in the affirmative.

Mr. Francis in support of the appeal.

Mr. Woolley contrà.

The COURT directed *Mr. Francis's* attention to the question of an order for mere access.

Mr. Francis: The question depends on the wording of 20 & 21 Vict. c. 85, s. 35: "In any suit or other proceeding "for obtaining a judicial separation, or a decree of nullity of

1861. November 13.

THOMPSON v. THOMPSON AND STURMFELLS.

"marriage, and on any petition for dissolving a marriage, the "Court may from time to time, before making its final decree, "make such interim orders, and may make such provision in "the final decree as it may deem just and proper with respect "to the custody, etc., of the children, the marriage of whose "parents is the subject of such suit or other proceedings," etc. It is submitted that under these words the Court has power to make an order for access merely; it is an incident to the general power given by this section, and especially where the custody of the children is in the hands of a third party.

KEATING, J.: I am of opinion that there is no ground for interfering with the course adopted by the Judge Ordinary. As a question has been suggested whether the Judge Ordinary would have had jurisdiction to have made an order for mere access, I wish to state that it appears to me that he would have had such jurisdiction. I think Mr. Francis is right in the interpretation he puts on the words "with respect to the custody." The only other question here is, whether the course adopted by the Judge Ordinary, on the materials then before him, was wrong; because, unless we thought so, it is one of those interlocutory matters, not touching the main issue, so particularly within the judicial discretion of the Court, that we should not be inclined to interfere; but we think he was perfectly right. The appeal must therefore be dismissed.

WILDE, B.: I am of the same opinion. I think the Judge Ordinary has power to make an order for access merely to the children *pendente lite.*

Appeal dismissed. Wife's costs of appeal not to be taxed against the husband.

1861.
November 12.

BOULTON v. BOULTON AND PAGE.

(*Before the* JUDGE ORDINARY *on Motion.*)

BOULTON *v.* BOULTON AND PAGE.

Decree Nisi *for Dissolution of Marriage.—Affidavits of Respondent disclosing material matter.—Practice.*

When, on application to make absolute a rule *nisi* for dissolution at the suit of the husband, it appeared that affidavits had been filed by the respondent which alleged the husband's bigamy and conviction thereof, the Court refused to make the decree absolute, and directed the Registrar to inform the Queen's Proctor that such affidavits had been filed, and permitted the petitioner to file affidavits in answer.

Mr. Staveley Hill moved, on the usual affidavits, that the decree *nisi*, pronounced in this case on the petition of the husband, on the 31st of May last, should be made absolute.

Mr. G. Francis read an affidavit sworn by the respondent to the effect that she had not appeared in consequence of having been told by the petitioner's attorney that it would be better that she should not do so, and that she had heard no more of the matter until she was served with the decree fixing the co-respondent with costs. She further alleged that the petitioner had been guilty of bigamy; that he had been convicted of that offence, and transported for seven years; and that, upon his return from transportation, he presented this petition. The learned counsel suggested that the decree should be postponed in order that the affidavit might be laid before the Queen's Proctor.

Mr. Staveley Hill submitted, that neither the respondent nor the co-respondent had any right to show cause against making the decree absolute.

THE JUDGE ORDINARY: Does it require any act of the Court to make a decree *nisi* absolute? If you ask me to

1861. November 12.

BOULTON v. ROULTON AND PAGE.

make the decree absolute, I refuse to do so till this matter is satisfactorily explained. I shall direct the Registrar to give information to the Queen's Proctor that these affidavits have been filed, and the petitioner may be at liberty to bring in affidavits in answer to them.

GETHIN *v.* GETHIN, and the QUEEN'S PROCTOR intervening.

GETHIN v. GETHIN.

Petition for Dissolution at Suit of Wife.—No Answer.—Petition part proved.—Intervention of Queen's Proctor.—Practice.

The wife petitioned for dissolution; the husband made no answer; the hearing of the petition had been adjourned for further proof, pending which the Queen's Proctor intervened, and alleged the petitioner's adultery, who took issue thereon, and the Court allowed the proof of the original petition to be completed, and the issue as between the petitioner and Queen's Proctor to be set down for trial by a jury, retaining the same position in the cause-list as the original petition.

This was a petition for dissolution of marriage by reason of the husband's adultery and desertion. The husband had put in no answer. The case came on for proof in the sittings after Trinity Term, and had been adjourned in order that the petitioner might have an opportunity of producing further evidence in support of her petition. Since the adjournment the Queen's Proctor had obtained leave to intervene, and had alleged that the petitioner had been guilty of adultery. Upon that allegation issue had been joined by the petitioner.

Dr. Spinks, for the petitioner, moved that she might be allowed to call the additional evidence in support of her petition before the Court without a jury, and then that the question raised between her and the Queen's Proctor might be tried by a jury. The questions raised by the allegations in

her petition and by the allegations of the Queen's Proctor were quite distinct. There is no issue on the original petition, either by the respondent or the Queen's Proctor.

1861.
November 12.

GETHIN
v.
GETHIN.

Mr. Giffard, for the Queen's Proctor, opposed the motion, and submitted that the whole case ought to be tried before the same tribunal.

THE JUDGE ORDINARY: I think this application may be granted. The case stands in a different position from one in which issues had been joined on the petition, but the Queen's Proctor's portion of the case must take the same place in the cause-list as the original case does. It must not go to the bottom of the list.

(*Before the Full Court,*—THE JUDGE ORDINARY, KEATING, J., *and* WILDE, B. *Appeal from the Judge Ordinary.*)

November 13.

HILL *v.* HILL.

HILL *v.* HILL.

Appeal from Decision of the Judge Ordinary refusing Rule Nisi *for new Trial.*

Wife petitioned against the husband for judicial separation by reason of his cruelty, and he took issue thereon. He signed a letter consenting to a decree on the suggestion of his solicitor, that if he did so, no evidence in support of the petition need be taken in Court. The issue came on for trial before the Judge Ordinary and a special jury, who found a verdict for the petitioner on her evidence and that of other witnesses on her behalf. The respondent's letter was also put in evidence. The Court affirmed, on appeal, the refusal of the Judge Ordinary to grant a rule *nisi* for a new trial on the representation that the respondent was led by the mistaken suggestion of his then solicitor to withhold evidence contradictory of the petitioner's evidence, by which his character as a gentleman and man of honour was affected.

1861. November 18.

On an appeal the Court will only look at the same evidence and circumstances as were before the Judge appealed from.

HILL *v.* HILL.

Dr. Tristram in support of the appeal: This is an appeal from the decision of the Judge Ordinary, refusing to make a rule *nisi* for a new trial at the prayer of the respondent under the following circumstances:—Lieutenant Hill, the respondent, who had served in the Bombay Lancers, was married to the petitioner on the 17th of May, 1860; in the October of that year Mrs. Hill petitioned for a judicial separation by reason of her husband's cruelty. In November, 1860, Lieutenant Hill commenced a suit for dissolution of the marriage by reason of his wife's alleged adultery with a man of the name of Wood. The petitions were served on the respective respondents on the same day. On the 17th and 18th of June, 1861, the petition for dissolution came on for trial before the Judge Ordinary and a jury, who returned a verdict negativing the adultery. On the 27th of June, the petition for judicial separation came on before the Judge Ordinary and a special jury; previous to that Lieutenant Hill had left England for France; his then solicitor, Mr. Finney, represented to him that, by signing a letter of consent to a sentence by default, a judicial separation would be made without any evidence being taken. In this, of course, Mr. Finney was mistaken. Lieutenant Hill, however, wrote the following letter, which was produced at the trial:—

"My dear Sir,—I authorize you to consent to a decree "against me in the suit my wife has instituted against me for "a judicial separation, and that such a decree shall extend to "the payment by me of the alimony already ordered to be "paid her by me, with liberty to her to apply to increase the "same if so advised, and that it shall also direct that the costs "shall be paid by me.

"Yours very truly,

"C. WILLOUGHBY HILL."

Mrs. Hill, and other witnesses on her behalf, were examined, and the jury found a verdict affirming the cruelty. Lieutenant Hill is now anxious that a full investigation should take place by means of a new trial, and I have affidavits from himself and other persons negativing the facts deposed to by Mrs. Hill and her witnesses, which seriously affect his position as an officer and a gentleman.

BY THE COURT: We can look at no new affidavits, we can only take the case as it was when the Judge Ordinary refused a rule *nisi*.

KEATING, J.: I am of opinion that there is no ground for granting the rule. It appears that a suit was brought by Mr. Hill for a dissolution of his marriage, the issue raised by which was tried by a jury, who found a verdict for the respondents. There is no pretence for saying that Mr. Hill was not then fully represented. In the second suit for judicial separation by reason of his cruelty, the case was tried before a special jury, and Mr. Hill was again represented by counsel. The trial took the usual and ordinary course; amongst other evidence, a letter from Mr. Hill consenting to a decree was proved; it was cogent evidence on that issue, but it was not the only evidence. Mrs. Hill was examined and cross-examined, and, as the Judge Ordinary has said, certain evidence of medical men taken in the former suit was read from the judge's notes at the desire of Mr. Hill's counsel, to save expense. The verdict of the jury affirmed the cruelty alleged by Mrs. Hill. What, then, is the ground of the present application; Mr. Hill suggests that his solicitor had informed him, that, if he wrote a letter to consent to a degree of judicial separation, it would have a particular effect, namely, of preventing evidence being taken on the trial, which it could not possibly have; and we are now asked to subject Mrs. Hill a second time to the painful exposure of the witness-box and

1861, November 13.

HILL v. HILL.

cross-examination. We think there is no pretence for so doing. The appeal must be dismissed.

WILDE, B.: I am of the same opinion. In substance the application is for a new trial, not on the ground that the decree to be founded on the verdict is contrary to justice, or that the respondent would be dissatisfied with the decree, for from his letter he was evidently willing to have a judicial separation; but the ground of the application is, that in the course of the proceeding evidence was given against him, affecting, as he alleges, his character as a gentleman and man of honour, which his attorney had advised him could not be given. *Appeal dismissed.*

November 12.

FISHER v. FISHER.

FISHER v. FISHER.

Decree for Dissolution at Suit of Wife.—Maintenance.— 20 & 21 *Vict. c.* 85, *s.* 32.

The Legislature did not intend that a wife entitled to a dissolution of marriage should purchase it at the price of being left destitute; and where the circumstances of husband allow of it, the Court will direct a maintenance to be secured to the woman so long as she remains chaste and unmarried.

This was originally a suit for dissolution of marriage at the petition of the wife. The issues were tried before the Judge Ordinary and a jury.

Dr. Phillimore, Q.C., and *Mr. R. Pritchard* for the wife.

Serjeant Shee and *Mr. D. D. Keane* for the husband.—Verdict was found for the wife, and on application for some permanent maintenance for her under 20 & 21 Vict. c. 85,

s. 32, the Judge Ordinary took time to consider the circumstances of the case and the proper course to be followed under the above section. *Cur. adv. vult.*

1861. November 12.

FISHER v. FISHER.

THE JUDGE ORDINARY: This was a petition by a wife for dissolution of her marriage on the ground of adultery, coupled with cruelty. In December of last year a decree *nisi* for dissolution of the marriage was pronounced.

The petitioner afterwards moved for a decree absolute, and for a provision in the nature of permanent alimony under the 32nd section of 20 & 21 Vict. c. 85. The matter stood over by consent, the respondent undertaking to submit his books to the inspection of some accountant appointed by the petitioner. This was accordingly done, and on the 25th of July the matter was brought on and witnesses were examined on both sides touching the property of the husband and the profits of his business. The clause upon which the Court is asked to proceed is in these terms:—"The Court may, if it "shall think fit, on any such decree (*i. e.* decree declaring the "marriage to be dissolved), order that the husband shall, to "the satisfaction of the Court, secure to the wife such gross "sum of money for any term not exceeding her own life as, "having regard to her fortune (if any), to the ability of the "husband, and to the conduct of the parties, it shall deem "reasonable, and for that purpose may refer it, etc., and sus-"pend the pronouncing of its decree till such deed shall have "been duly executed." From this latter branch of the section, doubts have been suggested, whether the Legislature intended the provision to extend to cases where the wife is the petitioner; but in two or three instances the Court, when consisting of three members, treated it as applicable to such cases, and I cannot doubt that such construction was right, comparing this clause with the 45th, which enables the Court, when a divorce is decreed for adultery of the wife, to take from her any property to which she is entitled either in pos-

1861. November 12.

FISHER v. FISHER.

session or reversion, and order it to be settled for the benefit of the innocent party or the children of the marriage. But whether the power is to be exercised or not is in the discretion of the Court, "if it shall think fit," and if it does think fit, the amount to be settled depends also upon the discretion of the Court, "so much as it shall deem reasonable."

Certain matters are, by the direction of the Legislature, to be considered by the Court in exercising this large discretionary power, viz. the fortune of the wife (if any), the ability of the husband, and the conduct of the parties. Beyond that, no assistance is given by the Legislature, no principle is stated or suggested as applicable to such a case. I have considered the practice of the Ecclesiastical Court in cases of divorce *à mensâ et thoro*, and the usual course pursued by the Legislature in cases of Divorce Bills, without being able to find, in what has been done in either tribunal, any effectual assistance.

I understand that in the Ecclesiastical Court, when a divorce was decreed at the suit of the husband, permanent alimony was not granted. When the wife was the complaining party, the Court granted permanent alimony; and something like a rule as to the proportion of the husband's income to be granted may be extracted from the reported cases. But there she remained the wife of the respondent, and in that character he was bound to maintain her. Alimony, either *pendente lite* or permanent, is a provision for a wife. In Parliament there have been several cases where it has been thought fit to provide for the maintenance of a delinquent wife after the dissolution of the marriage. Many cogent arguments have been urged against making such provision, nevertheless it may be taken to have been the practice of Parliament to make it; but such cases are inapplicable to the present. The husband *elected* to have the marriage dissolved, and to be again free from all marital obligations. He therefore was at liberty to take what he asked upon the terms offered.

It may seem hard that, having good grounds for electing to

be released from the marriage tie, he should be called upon to provide for the delinquent, but I am not now discussing that question, or the policy of making such provision. I merely point out that such cases differ from the present, the election being there made by the husband; but on another ground they are useless as precedents, for the provision made by the Legislature was not according to any rule or any given proportion of the husband's property. Very few Divorce Bills were passed at the instance of the wife, and I cannot find any one in which the husband was compelled to make provision for a wife, who elected to be divorced from him. In the present case the wife elects to have the marriage dissolved, and, although she had strong grounds for complaint, I cannot consider her as in a position at all resembling that of a wife divorced *à mensâ et thoro*. She might have been relieved from the necessity of living with her husband and have remained his wife, but her election was not to do so. Still, although she did so elect, having good grounds for complaint, the respondent may be considered as in some sort depriving her of her position, and the Legislature no doubt intended that she should not seek a remedy at the expense of being left destitute. Not being able to derive any assistance from the practice of Parliament or the Ecclesiastical Court, I must take upon myself the arduous duty of deciding what is reasonable in this case. I consider, then, that the wife ought not to be left destitute; on the other hand, I think it would not be politic to give to wives any great pecuniary interest in obtaining a dissolution of the marriage tie. The petitioner had no fortune of her own; the husband has some fortune and trading profits, but they are neither large nor certain. Under such circumstances I think I ought not to award more than a maintenance. It was stated by counsel that the parties had agreed that the daughter should remain with her mother and be maintained by her; I therefore take that into consideration.

1861. November 12. FISHER v. FISHER.

The next point is the period for which the payment to the petitioner shall be continued. Had she been divorced *à mensâ et thoro*, and had afterwards been herself guilty of adultery, she would have become liable to the loss of her alimony. If hereafter the petitioner should become guilty of immorality, it would be unreasonable to call upon the former husband to maintain her. Again, if she avails herself of the freedom conferred by the decree of this Court and marries again, it would be unreasonable to compel the former husband to maintain her.

I am therefore of opinion, that so long as the petitioner leads a chaste life and remains sole and unmarried and maintains the daughter, the respondent should pay her an annuity of £100 per annum, payable quarterly, at the four usual feasts; the first payment the next quarter-day after decree. In the event of the death or marriage of the daughter, to be reduced to £80. Deed to be prepared by conveyancing counsel to secure the annuity on such fixed property as respondent has, and by his covenant. Daughter to remain in custody of the mother until further order. Costs, except those of examining respondent's books, to be paid by respondent.

Nov. 12 and 26. HEPWORTH v. HEPWORTH.

HEPWORTH v. HEPWORTH.

Wife's Petition for Dissolution.—Order on Husband to pay sum of money into Court to meet her Costs of Hearing.—Attachment.—Practice.

Where an order had been made on the husband, respondent, to pay into Court or give security for a sum of money to meet the wife's costs of the hearing, to be subsequently taxed, and such order was not obeyed, the respondent alleging on affidavit his inability to raise the money or give security, the Court ordered an attachment to issue

against him, but to lie in the registry for one week from the date of such order.

1861.
Nov. 12 and 26.

HEPWORTH v. HEPWORTH.

This was a petition for dissolution of marriage, at the suit of the wife.

Dr. Wambey, for the petitioner, now moved for an attachment against the respondent for non-compliance with an order directing him to deposit £400 in the registry, or to find security for that sum, to meet the petitioner's costs of the hearing. The learned judge granted a rule *nisi*, and

Dr. Phillimore, Q.C., and *Dr. Spinks*, for the respondent, being ready to show cause, opposed the application. Mr. Hepworth was a surgeon, with an annual income derived from his profession of £170, out of which he had two children to maintain. He had to pay £3 a month to Mrs. Hepworth by way of alimony. He had paid £92 to her solicitor for her costs in another suit, and he swore that he was unable to raise £400, or to find security for it, and that imprisonment would ruin him. He had been ordered to deposit £300 in the other suit. Practically, it was impossible for him to obey these orders. They cited *Walker* v. *Walker*, 1 Curt. 564. Again, the Court is asked to deprive Mr. Hepworth of his liberty for not paying or finding security for a sum of money for which he may never really be liable, for the costs may ultimately be taxed at £200 or £300 instead of £400.

THE JUDGE ORDINARY: The question is one of great gravity. The present system was adopted to relieve the husband from the necessity of paying the wife's taxed costs before the hearing, as was the old system; but if I cannot effect the security of the wife's proctor in this mode, I must recur to the old plan, have the costs taxed as they best can before the hearing, and make the husband absolutely pay the amount. I must take time to consider this question. *Cur. adv. vult.*

1861.
November 26.

HEPWORTH
v.
HEPWORTH.

THE JUDGE ORDINARY: This was an application for attachment against Mr. Hepworth, for not paying money into Court, or giving security therefor, to meet the wife's costs of trial, in pursuance of an order of the Court. He has filed affidavits in which he alleges his inability to raise the money or give security. The case cited from 1 Curt. was somewhat similar in its circumstances; but there the husband was the petitioner, and though Dr. Lushington refused to make the usual order for taxation, he, on the other hand, refused to fix any day for the hearing. Here the wife is the complaining party, and if the suit is stayed, of course the husband would take good care to keep it in that position. It has been urged that, as this is a suit for dissolution, and does not fall under the 22nd section of the Divorce Act, I have no authority to issue the attachment. I think, however, that the 32nd section of the Divorce Act warrants what I am about to do. The latter part of that section is as follows:—"And upon any petition for dissolution "of marriage, the Court shall have the same power to make "interim orders for payment of money by way of alimony or "otherwise to the wife, as it would have in a suit instituted "for judicial separation." I have before stated that the present practice was adopted with a view to relieve parties from the burdensome and inconvenient plan of taxation and payment before the hearing, when it is so difficult to form a correct judgment of what the actual costs will be. I can find no other method to secure the wife's proctor, and think that in the present case the reasonable course of proceeding will be to direct an attachment to issue, which, however, will lie in the registry for a week.

1861.
December 24.
And
1862.
January 14.

BAWDEN *v.* BAWDEN.

Petition for Dissolution.—Wife Respondent.—Lunatic.

The Court refused to allow a husband to proceed with a petition against his wife (who was a lunatic) for the dissolution of their marriage on the ground of adultery, alleged to have been committed by her previous to her lunacy.

This was a petition filed by the husband, for the dissolution of the marriage, on the ground of his wife's bigamy and adultery.

The petitioner was residing at Camborne, in the county of Cornwall. The respondent separated from him shortly after their marriage, and went to America, where she contracted, as was alleged, a bigamous marriage with a man of the name of John Ward, with whom she cohabited. She afterwards returned to this country, and becoming a lunatic, and her husband refusing to support her, became chargeable to the parish of Camborne and an inmate of the union workhouse at Redruth. She was now confined in the county lunatic asylum at Bodmin.

The citation and petition had been served upon her at the Redruth union workhouse in the presence of the master.

No appearance had been entered on her behalf.

Dr. Wambey moved the Court to appoint a curator or guardian *ad litem* to the respondent to protect her interests in the suit. The circumstances were peculiar, and he admitted that he could find no precedent for the application. In the Ecclesiastical Courts a suit for nullity of marriage had been allowed to be instituted by the committee of a lunatic under the direction of the Court of Chancery (*Portsmouth* v. *Portsmouth*, by his committee, 1 Hagg. 355); and a suit for divorce by the committee of a lunatic husband, on the ground of the wife's adultery (*Parnell* v. *Parnell*, 2 Consist. 169). In

1861. December 24. And 1862. January 14.

BAWDEN v. BAWDEN.

Barham v. *Barham*, 1 Consist. 5, the Court had appointed a curator *ad litem* to enable a minor wife to sue her husband for a divorce. There was also the well-known case of *Beauraine* v. *Beauraine*, 1 Consist. 498, in which Lord Stowell appointed a father curator *ad litem* for his minor son, who was sued by his wife for a divorce. By the analogy of these cases, he submitted that it was competent to the Court to appoint a curator *ad litem* for the wife. Notices of the motion had been served upon the brother and sister of the respondent, who were her nearest relatives, and also on the overseers of the parish of Camborne.

Dr. Tristram appeared for the overseers of the parish of Camborne, who were desirous, if the Court allowed the suit to proceed, that the assistant overseer of the parish of Camborne (whose office was a permanent one) should be appointed curator *ad litem* for the wife, her nearest relations having declined to interfere on her behalf. It was clear that she should have some one to watch over her interests during the progress of the suit. The parish of Camborne, as she was chargeable on it, was interested in the result of the suit, and he submitted that a parish officer was the most proper person, under the circumstances, to be appointed guardian.

THE JUDGE ORDINARY: This case is very different from one where a lunatic is the petitioner. The motion raises a most important question, and I shall not decide it without further consideration and inquiry. I very much doubt whether I can allow the petition to proceed. *Cur. adv. vult.*

January 14. THE JUDGE ORDINARY: The petitioner in this case is the husband, who prays for a dissolution of his marriage on the ground of his wife's bigamy and adultery. The respondent is proved by affidavit to be a lunatic. The question is, whether the petitioner should be allowed to proceed under the circum-

stances. It will be a hard case upon the petitioner, if he is not allowed to do so. But it will also be a hard case upon the respondent, who is not able to take part in the proceedings, if he is allowed. I have made inquiry if there had been any case in the Ecclesiastical Courts under similar circumstances, which could be an authority for me in giving my decision. I am told by Dr. Bayford that there was one which he himself argued in the Court of Arches. It is not reported; but he recollects that the Court decided that a suit for divorce *à mensâ et thoro* could not be maintained against a lunatic. I cannot allow the petitioner to proceed in the present suit.

1861. December 24. And 1862. January 14.

BAWDEN v. BAWDEN.

QUICKE *v.* QUICKE.

1861. November 18.

QUICKE v. QUICKE.

Petition for Dissolution.—Motion to proceed without Co-respondent.

Unless the petitioner can satisfy the Court on affidavit that he cannot or ought not to make a co-respondent, the 28th section of the Divorce Act is imperative that he should do so.

This was an application to proceed with making a co-respondent. The husband's petition stated a marriage in 1842; that in 1844 he was a prisoner in the Queen's Bench prison. "Thirdly, that very shortly after your petitioner was imprisoned as aforesaid, the said Catherine Quick prostituted her person, and has ever since continued to prostitute her person, and has been constantly visited by and committed adultery with persons other than and unknown to her husband, at her several residences, to wit, at No. 33, New Bond Street, at 16, Jermyn Street, at 19, Bolton Street, Piccadilly, all in the county of Middlesex; and at Lansdown Place, Brighton, in the county of Sussex."

The petitioner's affidavit merely stated that he had reason to believe as above stated.

1861. November 18.

QUICKE v. QUICKE.

Dr. Spinks moved the Court to allow the petitioner to proceed without making a co-respondent.

BY THE COURT: There is no affidavit that he does not know any one of the adulterers.

Dr. Spinks: The question is, whether under such circumstances a petitioner is bound to make a co-respondent.

THE JUDGE ORDINARY: The 28th section of the Divorce Act clearly intends that the adulterer should be made a co-respondent unless some special grounds are shown for not doing so. You ought to show that you are not able to allege an adulterer. If the petitioner is allowed to proceed without making a co-respondent, he gets rid of one person interested in defeating the suit by bringing forward all the facts of the case. Unless you can make such an affidavit as to satisfy me that there ought not to be a co-respondent, then the section requires one. *Motion rejected.*

[See *Hook* v. *Hook*, 1 Swab. & Trist. 183.]

ZYCKLINSKI *v.* ZYCKLINSKI, on Motion.

December 24. And 1862. January 14.

ZYCKLINSKI v. ZYCKLINSKI.

Petition for Dissolution.—Plea to the Jurisdiction.—Practice.

Wife filed petition for dissolution of marriage, which was served on the husband, who appeared absolutely, and obtained further time to answer. He filed an answer, objecting to the jurisdiction of the Court, by reason of his want of an English domicil, and the incapacity of the petitioner to institute a suit in her own name by reason of her infancy. On motion to take this answer off the file, the Court

HELD, that it was too late for the respondent to raise such objection.

In this case Adelaide Kate Zycklinski had filed a petition, dated the 3rd of September, 1861, for dissolution of the mar-

riage, which took place on the 27th of October, 1860, by reason of her husband's cruelty and adultery. An appearance was entered on behalf of the husband, and on summons in chambers further time was obtained on his behalf for answering the petition. On the 3rd of December, 1861, an answer was filed on his behalf, stating, first, that he was not amenable to the jurisdiction of the Court by reason that his domicil of origin was in Prussian Poland, that he had never abandoned that domicil or acquired any domicil in England sufficient to found the jurisdiction of the Court; secondly, that the petitioner was incapacitated in law from maintaining any suit in this Court either in person or by her attorney, by reason that at the time of the institution of the suit and the service of the petition she was and then remained an infant under the age of twenty-one years. And submitted to the judgment of the Court that he was not bound to answer to the said petition, and prayed to be dismissed from all further observance of justice herein.

Upon this, notice was given to the respondent's attorneys, that the Court would be moved on behalf of the petitioner to direct the above answer to be taken off the file, and to order the respondent, if he think fit, to file an answer to the merits of the case within three days.

Dr. Spinks moved the Court accordingly: It is too late for the respondent to raise such questions. He has appeared absolutely, and not under protest, and has twice obtained leave for further time to answer. As to the institution of the suit by a minor, it may be cured without a fresh citation and service (*Brown* v. *Brown*, 2 Rob. 302–5).

Dr. Swabey, contrà: Admitting that the more regular practice in the Ecclesiastical Court would have been to have appeared under protest, yet it is merely a question of form, by which the Court, in a suit for dissolution especially, is no way

1861. December 24. And 1862. January 14.

ZYCKLINSKI v. ZYCKLINSKI.

bound. The plea to the jurisdiction is a substantial one, and is in time if it precedes other pleas. As to the second point, infancy is treated by Dr. Lushington, in *Brown* v. *Brown*, cited on the other side, as an incapacity to institute a suit.

Cur. adv. vult.

THE JUDGE ORDINARY: I am of opinion that, as the respondent appeared absolutely to the petition, and obtained time to answer it, he is no longer in a position to avail himself of such pleas; he must answer to the merits.

Jan. 29 and 30.

SERRELL v. SERRELL AND BAMFORD.

SERRELL v. SERRELL AND BAMFORD.

Petition for Dissolution.—Answer setting up Impotency.—Practice.—Evidence.

A husband petitioned for dissolution of marriage, by reason of his wife's adultery. She denied the adultery, alleged nullity of marriage by reason of incurable impotency of the husband, and prayed for a decree of nullity. At the hearing, respondent's counsel claimed to go into the question of nullity first, but the Court

HELD, that, as the wife had traversed, though argumentatively, the marriage alleged by the petitioner, the latter had a right to begin.

No examination of either of the parties by medical men under the order of the Court, and report thereupon, had been obtained, but, in support of the respondent's case, evidence of medical men as to examinations of the petitioner and respondent's persons during their cohabitation, was tendered and objected to; but the Court held such evidence to be admissible.

This was a petition for dissolution of marriage at the suit of the husband, by reason of the wife's adultery. The petition alleged a marriage in 1844. No issue. Cohabitation, latterly, in Gloucester Terrace, Paddington, till the 8th of January, 1861, when it was alleged the wife left her home,

and subsequently adulterously cohabited with the co-respondent. Adultery was also charged at divers places in the latter part of 1860. The wife, in answer, denied that she was lawfully married to the said Dalton Haskoll Serrell. "For" she says that "at the time of the celebration of the said pretended "marriage on the 5th of November, 1844, the said Dalton "Haskoll Serrell was impotent, and unable to consummate "their said marriage; that such impotency was then, and now "is incurable; that notwithstanding the said Dalton Haskoll "Serrell consulted divers medical men, and adopted divers "remedies, he continued impotent, unable to consummate the "said marriage; and that, although the respondent was apt "and willing to receive the conjugal embraces of the said "Dalton Haskoll Serrell, he never did consummate the said "marriage, but that, down to the 8th of January, 1861, when "the respondent ceased to reside with the said Dalton Haskoll "Serrell, she was and continued to be a virgin intact."

The answer further denied the adultery, and pleaded conduct conducing to adultery, if any. It prayed to reject the prayer of the petition, and asked for a declaratory sentence of nullity of marriage; or, in case the Court should decree dissolution, for an order to secure a gross sum of money, etc.

The co-respondent's answer simply denied the adultery.

The Court had directed the case to be heard before itself without a jury, and no order had been obtained for any examination of either of the parties by medical men and their report thereon.

Dr. Phillimore, Q.C., and *Dr. Swabey* for the petitioner.

Dr. Deane, Q.C., and *Dr. Spinks* for the respondent.

On the pleadings being opened, *Dr. Deane* claimed, on behalf of the respondent, to go into the question of the nullity of marriage before the petitioner's case was opened. He

1862. Jan. 29 and 30.

SERRELL v. SERRELL AND BAMFORD.

referred to an *Anon.* case, Deane and Swab. 295, and cases there cited.

Dr. Phillimore, contrà.

THE JUDGE ORDINARY: I think that the respondent's answer is substantially a denial of the marriage which the petitioner alleges to have been a lawful marriage. The answer is argumentative in part—it states reasons why the marriage is not lawful; but I must treat it substantially as a traverse, and the petitioner has therefore a right to begin.

The defendant's case was then distinctly proved.

Dr. Deane opened the respondent's case as one of undoubted impotency on the part of the husband.

William Henry Gardener was then sworn and examined on behalf of the respondent. He was a surgeon, and had been in the habit of attending Mr. and Mrs. Serrell at their house in Gloucester Terrace for the last six or seven years. Mrs. Serrell sometimes suffered from hysteria, nervous excitement, and general debility; the symptoms seemed to sympathize with her womb. Symptoms sometimes indicated functional disturbance of the womb; not always. Could not, as a medical man, undertake to say what was the cause of those symptoms. Had often spoken to Mr. Serrell about these symptoms and about calling in a second opinion. A Dr. Lee was called in somewhere about December, 1859. He was present when Dr. Lee came, and talked with him about the case before he went to see Mrs. Serrell.

The witness was then asked, "Were you present at any "examination by Dr. Lee of the person of Mrs. Serrell?"

Dr. Phillimore objected to the admissibility of such evidence. It is not competent to either party to offer inferior

evidence in such a matter. The Court and the party against whom such a charge is brought have a right to the report of medical men, agreed upon by the parties and approved by this Court, as to the condition of the parties at the time the charge is made. After a cohabitation with a *de facto* husband for sixteen years, and an admission in the answer that she is no longer a virgin intact, the woman setting up such a defence must be held to the strictest rules. If she has destroyed the usual and best mode of proof, she cannot, as against the husband, introduce inferior evidence.

1862.
Jan. 29 and 30.
SERRELL v. SERRELL AND BAMFORD.

Dr. Deane in support of the evidence: The distinction suggested as between primary and secondary evidence does not apply. The inspection of the parties by medical men under the order of the Court is not strictly primary evidence as contrasted with that which we now offer.

BY THE COURT: Can you show me any case where a woman, not in a condition to give the usual evidence from her own person, has gone into evidence of this sort, and obtained a decree of nullity? Could she complain of the grievance, being in the state in which she is?

Dr. Deane: Under the Divorce Act the Court is to act on the rules of evidence prevailing in Westminster Hall; at least this evidence is admissible, whatever conclusion upon it and the whole case the Court may finally come to, *H. falsely called C.* v. *C.*, 1 Swab. & Trist. 605. *Cur. adv. vult.*

THE JUDGE ORDINARY: I have considered the question raised yesterday, and am not aware of any rule in Westminster Hall which would exclude the evidence tendered, and I am of opinion that I must admit it. January 30.

The examination of Mr. Gardner and Dr. Lee was then

1862. Jan. 29 and 30.

SERRELL v. SERRELL AND BAMFORD.

proceeded with, but their evidence wholly failed to make out the respondent's charge, and her counsel admitted they could carry the case no further.

THE JUDGE ORDINARY animadverting strongly upon the conduct of parties in deceiving their professional advisers, and inducing them to set up a defence of such a nature, supported by such evidence, pronounced a decree *nisi* for dissolution of the marriage, and condemned the co-respondent in costs.

TURNER *v.* TURNER.

Jan. 21 and 28.

TURNER v. TURNER.

Judicial Separation.—Two Petitions filed.—Two Citations issued.—Entry of Appearance.—Practice.

A petition was filed and a citation issued on the part of a wife for a judicial separation on the ground of cruelty; neither this petition nor citation was served. The wife's solicitor, in consequence of fresh instructions, afterwards filed a second petition for a judicial separation, on the ground of adultery coupled with cruelty, and a citation issued thereon. The husband was served and entered an appearance in the second suit.

The Court directed the second suit to proceed.

On the 16th of October, 1861, a petition for a judicial separation on the ground of cruelty was filed in the registry on behalf of Mrs. Turner, the petitioner in this case. A citation issued thereon, but neither the petition nor citation was served upon the respondent.

On the 26th of November, 1861, another petition was filed on behalf of Mrs. Turner, by her solicitor, in consequence of fresh instructions, for a judicial separation on the ground of adultery coupled with cruelty, and a citation issued thereon. This petition and citation were served upon the respondent, who entered an appearance thereto.

1862.
Jan. 21 and 28.

TURNER v. TURNER.

The first petition had been filed by a clerk of Mrs. Turner's solicitor without his knowledge, and her solicitor filed the second petition on the supposition that the first one had not been filed. The citation which issued in the first suit could not be found.

Mr. Bushby, for the petitioner, upon these facts, moved the Court "to direct the petition filed in the second suit to be "taken off the file, or to dismiss the same, and to direct a "fresh citation to issue on the first suit."

THE JUDGE ORDINARY: You have got yourself into a difficulty. Perhaps the counsel for the respondent may consent to some course to help you out.

Dr. Tristram, for the respondent, did not oppose the motion, but would leave the other side to take their own course.

Cur. adv. vult.

January 28.

THE JUDGE ORDINARY: I have considered this case. There were two petitions filed, and two citations issued by the petitioner for a judicial separation against her husband. The first petition and citation were never served upon him; the second petition and citation were served, and he has entered an appearance to this citation. The second suit must therefore proceed.

(*Before the* JUDGE ORDINARY, *on Rule* Nisi *for New Trial.*)

February 18.

MILLER v. MILLER AND HICKS.

Rule Nisi *for New Trial.—Principles of Granting.*

MILLER v. MILLER AND HICKS.

The Court will not grant a new trial on the ground that the verdict

1862.
February 18.
MILLER
v.
MILLER AND HICKS.

against the weight of evidence, unless it is dissatisfied with the verdict—That it might on the same evidence have come to a different conclusion itself is not sufficient.

Statement on affidavit that other evidence could be produced to the jury on a new trial is not sufficient, if such evidence could with reasonable diligence have been obtained before.

This was originally the husband's petition for dissolution of marriage by reason of the wife's adultery. The issues raised were tried before the Judge Ordinary and a common jury, and a verdict found in favour of the respondent.

Subsequently *Dr. Phillimore*, Q.C., obtained a rule *nisi* for a new trial, and cause was shown by

Serjeant Pigott and *Dr. Wambey* for the respondent, and by *Mr. Bilton* for the co-respondent.

Dr. Phillimore, Q.C., and *Dr. Spinks*, in support of the rule.

Cur. adv. vult.

THE JUDGE ORDINARY: This was an application for a new trial on three grounds:—1. That the judge at the trial was under a misapprehension as to what had been proved by one of the witnesses, and therefore did not lay a material part of the evidence before the jury. 2. That the verdict was against the weight of evidence. 3. On affidavits to the effect that additional evidence could be produced on a new trial.

The petition of George William Miller charged the respondent with having committed adultery with the co-respondent Hicks, and with divers persons unknown to petitioner. The respondent denied the adultery, and alleged condonation. The co-respondent denied the adultery imputed to him, and alleged condonation and collusion. At the trial the petitioner gave evidence to prove not only the adultery with Hicks the co-respondent, but also with one Benjamin Button. One witness deposed to having seen the act of adultery committed by the respondent and co-respondent. She was a young girl in the

service of the petitioner.[1] During Dr. Phillimore's reply for the petitioner, a discussion arose as to the evidence of that witness being corroborated as to the fact of Hicks being there. There the matter dropped, and I am not aware that anything more was said on the subject during the trial. The learned doctor left, as he says, that part of the case in the hands of the jury, appealing to them as judges whether the evidence of the girl was corroborated by Dow or not. If the judge said anything erroneously which can be supposed to have misled the jury, the verdict ought not to stand; but I apprehend that the supposed misconception had nothing at all to do with the corroboration on which the learned doctor was relying when the discussion arose, viz., the fact of her seeing adultery committed on the Friday night. The fact of his being seen there on that evening at six and nine by Dow was material, and there was no misapprehension so far. His being seen there on Sunday morning really had no bearing on the case, for it was admitted on all hands that Hicks was very intimate with Mr. and Mrs. Miller, and frequently at the house; and the manner in which the discussion terminated makes it impossible to treat this as a ground for disturbing the verdict.

I come now to the question, whether the verdict was against the weight of evidence; and here I think it right to make some remarks upon the principles by which the Court should be governed in dealing with such questions.

On the one hand, it was urged that a jury is the constitutional tribunal by which questions of fact are to be determined; and that their finding ought to be treated as conclusive, and that the Court cannot disturb it on the ground of its being against the weight of evidence, without usurping a jurisdiction that does not properly belong to it. On the other hand, it

[1] The learned Judge here read the girl's evidence, but as this case is reported for the sake of the principles laid down under the second head, it does not seem necessary to go at length into the evidence under the first head.

1862. February 18.

MILLER v. MILLER AND HICKS.

was urged that in the Ecclesiastical Court there was always a right of appeal, first to the Court of Arches, and then to the Privy Council, and that this Court, if it does not recognize an absolute right to a second trial, should, at least, be very liberal in granting it.

I cannot adopt either view of the case. The difference between appeals from the Ecclesiastical Court and new trials is very obvious. In the former the evidence was all in writing and could not be varied; the Court of Appeal had the same materials and none other before it, as were submitted to the first Court; and the judge of the Court of Appeal was, in theory at least, assumed to be competent to form a more satisfactory judgment than the inferior tribunal. In trials before a jury it is scarcely possible to have a case tried a second time so dispassionately as the first: the parties become heated and excited by the contest; the evidence laid before a second jury may vary essentially from that which was submitted to the first; witnesses become, more or less, partisans in the cause; they may come prepared to baffle a cross-examination, and if on the first trial they have disclosed facts making against the party who called them, they may be altogether withdrawn; nor is there any reason to suppose that a second jury will be more competent than the first to form a sound opinion as to the effect of the evidence, unless something has occurred on the first trial to manifest either haste, or prejudice, or mistake. Nevertheless, I am far from acceding to the proposition that the finding of the jury ought to be treated as absolutely binding; a contrary rule has prevailed for more than two centuries, and, according to some opinions, much longer, and must now be deemed as settled law in Westminster Hall. The whole subject of setting aside verdicts of juries on questions of fact and granting new trials was fully discussed in the case of *Bright* v. *Eynon,* 1 Burr. 390; and 2 Kenyon's Notes, 53. In the latter report, at page 60, Lord Mansfield is made to say: "But it must be remembered that all pre-

"sumptions, arising either out of the evidence or from the "nature of the question, must be construed favourably in sup- "port of the verdict; therefore, the judge certifying only that "he thinks the weight of evidence was against the verdict, or "that, if he had been on the jury, he should have been of a "different opinion, this would not be a foundation for a new "trial, as was lately determined in a case tried before Serjeant "Willes (now C.B. of Ireland), and therefore it is proper that "a special report should be made to show the foundation of "the judge's dissatisfaction, that the whole Court may judge "whether it is well grounded or not." In many of the older reports cases may be found where the Courts of Westminster Hall have refused to set aside a verdict, although the judge, who tried the cause, said that he should have found a different one. And, according to the practice now prevailing, such a statement made by the presiding judge is not considered as a sufficient ground for a new trial. It is necessary that he should go further and say that he is dissatisfied, the word used by Lord Mansfield, which means something more than that he entertained a different opinion.

If, indeed, the jury during the trial show any symptoms of passion, or if the evidence is so strong on one side that their verdict, in defiance of it, can only be referred to prejudice or misapprehension, it is right to set it aside in order that the calm and intelligent consideration of a jury may be obtained.

If such is the rule observed in the Common Law Courts of Westminster Hall, where four judges have to deal with the question, how much more cautious ought I to be, when sitting alone and unaided, as to exercising the somewhat arbitrary power of compelling parties to submit their causes to the judgment of a second jury. The learned counsel for the petitioner repeatedly pressed upon my consideration the importance of this case to his client. Unquestionably it is most important, but it is not less so to the respondent. I must not, therefore, allow that argument to control my judgment.

1862. February 18.

MILLER v. MILLER AND HICKS.

The question then is, am I prepared to say that I am dissatisfied with the verdict? I cannot undertake to say what would have been my verdict had I been substituted for the jury; for I did not at the trial weigh the evidence under the sense of responsibility that rests upon a party, who is bound to decide upon the effect of it. No exception could be taken to the conduct of the jury during the trial. I observed no symptoms of prejudice, no haste or impatience; they withdrew to consider of their verdict, and it must be presumed that they calmly and deliberately weighed the evidence. Then, can it be said that the verdict is so contrary to the evidence that it must be ascribed to prejudice or misapprehension? There were some remarkable circumstances in the petitioner's case calculated to excite the observation and vigilance of the jury. The petition charged the respondent with having committed adultery at Margate in 1858, with a person unknown. Some evidence was given respecting her conduct at Margate, but it entirely failed to establish the charge made. Again, it was alleged that between the 1st of April and the 31st of August, 1859 (particularly on Tuesdays and Thursdays), Rosina S. Miller was frequently visited at her residence during the absence of the petitioner by divers men unknown to the petitioner, and that on divers of such occasions the said R. S. Miller then and there committed adultery. The only evidence tending to support that charge was a statement by Mary Dow, that "at Miller's house gentlemen often called "and saw Mrs. Miller, and she would take them upstairs "into the warehouse." That charge, therefore, fell to the ground, and it was very natural that the jury, when two such unfounded charges had been brought forward, should scan rather narrowly the evidence brought to substantiate the rest of the case. It was remarkable, too, that the name of Button (a man in the petitioner's employ), and with whom the respondent was said to have committed adultery, was not introduced into the petition, as in fairness it ought to have

been, for the greater part of the evidence related to her alleged indecent conduct towards him. It is true that one witness deposed to having seen an act of adultery committed by Hicks, the co-respondent, and Mrs. Miller; but pertinent observations were made upon her evidence, and I can well understand that the jury, notwithstanding that evidence, were left in a state of perplexity as to where the truth lay, and could not honestly say that they were convinced of the respondent's guilt, bearing in mind that they had the positive denial by Button of the truth of the evidence given as to him, and the solemn assertion of the respondent, which the petitioner for another purpose gave in evidence, that she was innocent of the offence imputed to her and Hicks. The petitioner was in this case, as in others, bound to prove the affirmative; and if he failed to do so to the satisfaction of the jury, they were bound to find against him.

I cannot say that I am dissatisfied with the verdict—I cannot even say that I should have found to the contrary of it, and therefore cannot, on the ground of its being a verdict against the weight of evidence, send the parties to a new trial.

The third ground for the application remains to be considered, viz., that further evidence set forth in affidavits could be laid before the jury on a second trial. That may be disposed of in a few words. All the evidence so set forth, which is of the least importance, might, by the exercise of reasonable diligence, have been obtained before the last trial. Some of such evidence (*e. g.* of the petitioner's children) had been obtained, but the counsel for the petitioner, in the exercise of what I cannot but think a most wise discretion, abstained from laying it before the jury. I cannot, therefore, disturb the verdict on this ground.

The result is, that the rule for a new trial must be discharged.

1862.
February 11.

FLETCHER
v.
FLETCHER.

FLETCHER *v.* FLETCHER (on Motion).

Alimony pendente lite.—*Husband on Leave of Absence from Bengal for Six Months without Pay.—No Income or Property.*

Where a husband, being a master pilot in Her Majesty's Bengal Pilotage Service, on six months' leave of absence without pay, was in the receipt of no income, and was possessed of no property whatever, the Court refused to allot to the wife alimony *pendente lite.*

This was a question arising on a petition for alimony *pendente lite.* The husband (who had petitioned the Court for a dissolution of his marriage on the ground of the alleged adultery of his wife) was a master pilot in Her Majesty's Bengal Pilotage Service, with an admitted income, when on full pay, of £540 per annum. In his answer he deposed, that in order to institute this suit he had applied for, and obtained leave of absence from the Government of Bengal, without pay, for six months, from the 2nd of October, 1861, to enable him to proceed to England on urgent private affairs. He also stated that he was possessed of no property or money, nor was he in the receipt of any present income whatever, and that he was entirely dependent on his friends for his support, and for the means of carrying on this suit.

Dr. Tristram moved for alimony *pendente lite* to be allotted to the wife. Alimony was allotted out of the annual income of the husband. According to the husband's answer, he had lost half of his annual income during the past year; but this was no reason why the wife should not have alimony awarded to her out of the income he received during the other six months of the past year. Upon this principle a professional man, if he had made no profits during the six months immediately previous to filing his answer, might claim

exemption from alimony *pendente lite*, although he had made a large income during the first six months of the year.

1862.
February 11.

FLETCHER v. FLETCHER.

Dr. Spinks, contrà, was stopped by the Court.

THE JUDGE ORDINARY: The case of the professional man is not analogous to the present case. The husband swears that he has no property whatever, and that he is at present in the receipt of no income. He has no funds out of which he could pay alimony, if I were to allot it. I shall therefore refuse to allot alimony *pendente lite*.

SYMONS *v.* SYMONS AND PIKE.

March 18 & 25.

SYMONS v. SYMONS AND PIKE.

Dismissal of Petition on Motion of the Respondent and Co-respondent.—Notice of abandonment of Petition by Petitioner.—Affidavit of service of notice of Motion.—Costs.—Practice.

Where a notice was given by the petitioner's solicitor to the solicitors of the respondent and co-respondent of the abandonment of the petition, the Court, on a motion made on the part of the respondent and co-respondent, supported by an affidavit of service of notice of motion on the petitioner's solicitors, dismissed the petition and condemned the petitioner in the respondent's and co-respondent's costs.

Henry Symons, the petitioner, had filed a petition for the dissolution of his marriage on the ground of the respondent's alleged adultery with the co-respondent, and praying for the condemnation of the co-respondent in the costs of the suit. The respondent and co-respondent had filed answers, amongst other things denying the adultery, and on the 26th of January, 1862, the solicitor for the petitioner served a notice in writing on the solicitors for the respondent and co-respondent, stating

1862. March 18 & 25. SYMONS v. SYMONS AND PIKE.

that the petitioner abandoned his petition for the dissolution of his marriage, and for the payment by the co-respondent of the costs of the suit.

Dr. Tristram now moved the Court on behalf of the respondent and co-respondent to dismiss the petition, and to condemn the petitioner in the respondent's and co-respondent's costs.

THE JUDGE ORDINARY: It is a serious matter dismissing a petition. I cannot do so unless the petitioner appears by counsel to consent to the motion, or unless you have an affidavit of service of notice of this motion on his solicitors.

Dr. Tristram: His solicitors have been served with notice of motion, but I have no affidavit of service.

THE JUDGE ORDINARY: The motion must stand over for an affidavit of service.

March 25. *Dr. Tristram* renewed the motion upon an affidavit of notice of service of the motion on the petitioner's solicitors. As the petitioner had allowed upwards of seven weeks to elapse since service of his notice to abandon the petition without taking any steps to procure its dismissal, he submitted he had good grounds for making this motion on behalf of the respondent and co-respondent.

THE JUDGE ORDINARY: I dismiss the petition, and condemn the petitioner in the respondent's and co-respondent's costs.

DAVIES *v.* DAVIES AND DALBY.

Attachment.—Nonpayment of Costs.—Service of Office Copy of Order for Payment of Costs.—Practice.

The Court will not grant an attachment for nonpayment of costs unless the original order for payment has been served upon the party liable by showing the same to him.

Where the original order has been filed in the registry, the Court, upon an affidavit of facts, will direct it to be delivered out for the purpose of service.

This was a motion for the attachment of the petitioner made on behalf of the proctor for the respondent (the wife) for non-compliance with an order of the Court for the payment of £45. 6*s*. 1*d*., being the amount of the wife's taxed costs up to the hearing.

The original order for the payment of these costs had been annexed to an affidavit which was filed in the registry. An office copy of the order had been served upon the petitioner, but the original order, being in the registry, had not been shown him.

Dr. Tristram moved for an attachment against the petitioner for non-payment of these costs.

THE JUDGE ORDINARY: The petitioner has not been shown the original order for the payment of costs. Until this has been done, the order cannot be said to have been served upon him. Upon an application being made to the Court founded upon an affidavit of these facts, it will direct the original order to be delivered out to the respondent's proctor, to enable him to serve it on the petitioner.

1861.
November 22 & December 8.

DEMPSTER v. DEMPSTER.

(*Before the* JUDGE ORDINARY.)

DEMPSTER *v.* DEMPSTER.

Wife's Petition for dissolution.—Cruelty and Adultery.—Condonation.

Where, on an unopposed petition by the wife for dissolution by reason of the husband's cruelty and adultery, it appeared that after the cruelty, which was proved to have taken place, the wife had continued to cohabit with her husband, in ignorance, however, of the adultery which had then in fact taken place, though it did not come to her knowledge till afterwards, the Court was inclined to hold that cruelty condoned under such circumstances would, in effect, revive upon the subsequent knowledge of the adultery and action taken thereupon; that the wife's acquaintance with the husband's delinquencies of every sort may be a branch of the condition on which all condonation depends; but that under sects. 30 and 31 of 20 & 21 Vict. c. 85, the petitioner was clearly entitled to a decree *nisi*.

This was a question arising on the proof of an unopposed petition by the wife for dissolution of marriage on the ground of the husband's cruelty and adultery.

Dr. Phillimore, Q.C., and *Mr. Pritchard* conducted the petitioner's case. It appeared that the husband had been guilty of cruelty and adultery, but that the wife had continued to live with him after the cruelty proved, and also after the adultery had in fact been committed, though she was then ignorant of any adultery. On this state of facts,

Cur. adv. vult. as to the petitioner's right to a decree *nisi*.

December 8. THE JUDGE ORDINARY: This was a petition by the wife for a dissolution of her marriage, on the ground of adultery coupled with cruelty. The respondent did not appear to the citation. The petitioner gave evidence which, in my opinion, established both adultery and cruelty. The cruelty, if it had stood alone, would have been condoned by subsequent cohabitation. No act of adultery was proved to have been com-

mitted after that cohabitation ceased; but the wife never knew of any prior act until after that time.

This state of facts raised two questions, one of which, as far as I know, is new, and the other has never been expressly and in terms decided, viz. whether the wife, by cohabitation with her husband, condoned his cruelty, he having also been guilty of adultery, which was not then known to her; and secondly, whether condonation of the cruelty would deprive the wife of her right to a dissolution of the marriage. On the hearing I was inclined to hold that, as the wife continued to cohabit with her husband after the cruelty proved had been committed, it was thereby condoned; but, on further consideration, I entertain great doubts as to the soundness of that opinion.

The language of the learned Judges presiding in the Ecclesiastical Courts has not been very precise or uniform on this subject. In *Turton* v. *Turton*, 3 Hagg. Eccl. Rep. 351, Dr. Lushington is reported to have said, "I take the doctrine to "be perfectly true as laid down by the learned Dean of the "Arches, in *Durant* v. *Durant*, that in order to form a legal "condonation there must be a complete knowledge of all the "adulterous connection, and a condonation subsequent to it." Again, in *Bramwell* v. *Bramwell*, 3 Hagg. 629, the same learned Judge said: "Condonation, however, has been set up; "but this condonation is not only conditional in the eyes of the "law, as all condonations are, but it is specially so; and a "question might arise, as in the case of *Durant* v. *Durant*, "whether, at the time Mrs. Bramwell forgave the offences of "her husband against her, the whole of them were known to "her, for it was in that case laid down by the highest authority, "that condonation only takes effect upon a full knowledge of "all the guilt. . . .

"It is not, however, in my view of the case, necessary to "inquire whether any part of this early adultery has been "condoned; still less whether the condonation applied to all

1861. November 22 & December 3. DEMPSTER v. DEMPSTER.

"the adultery, for, assuming that the condonation was com-
"plete, and extended to all the previous adultery, under what
"circumstances, and on what conditions, was it given, and
"what was the duty of the husband, and what was his conduct
"afterwards?" Now this latter paragraph raises a doubt whether he was of opinion that no part of a husband's delinquencies could be condoned unless all was known, or whether he meant that condonation of the part known would be unavailing, as that which was at the time unknown, and therefore remained uncondoned, would suffice to sustain the suit. Adverting to *Durant* v. *Durant*, 1 Hagg. 733, the case cited by Dr. Lushington, I find this passage on the subject of condonation: "To establish condonation of that third adultery,
"and thereby to bar her of her remedy, there must be proof
"that she was aware of her husband's renewed misconduct,
"for the mere fact of subsequent cohabitation does not imply
"forgiveness nor operate as a bar, unless knowledge of the
"adultery shown." If that is the passage referred to in *Turton* v. *Turton* and *Bramwell* v. *Bramwell*, and the doctrine in these two cases is not meant to go beyond the former decision, it still leaves it an open question whether condonation of one adultery can be effectual, although another adultery had been previously committed, which at the time of the alleged condonation was not known. If the *dicta* cited from *Turton* v. *Turton* and *Bramwell* v. *Bramwell* are to be taken literally, they dispose of the question; but if they are to be construed with reference to the facts of those cases, and with reference to *Durant* v. *Durant*, they seem to me to leave it an open question, whether adultery by a husband with *A.* may not be condoned, although he had previously been guilty of adultery with *B.*, which at the time of the alleged condonation was unknown to the wife.

Adverting to the acknowledged principle that all condonations are conditional, and that any subsequent delinquency is a breach of the condition, why should it not be held that

another branch of the condition is, that the wife has been made acquainted with all her husband's delinquencies, and that, if she has not, the right to complain of that which has been condoned shall revive, the condonation having been, in a manner, obtained under false pretences? It may be said that the case of adultery differs from that of cruelty and adultery, and that the whole of the cruelty being known, may be well condoned, although nothing is known of the adultery. But the same is true of adultery with *A.* and *B.*; the whole of the delinquency with *A.* may be known. The reasons above suggested are, therefore, as applicable in the one case as the other.

But it seems to me unnecessary to express any decided opinion on this point; the words of the statute point out the judgment that I ought to pronounce on the whole case. Sect. 29: "Upon any such petition for the dissolution of a marriage, "it shall be the duty of the Court to satisfy itself, so far as it "reasonably can, not only as to the facts alleged, but also "whether or no the petitioner has been in any manner acces- "sory to, or conniving at, the adultery, or has condoned the "same." I read this on account of Dr. Phillimore's contention that, in the absence of any plea of condonation, I was not called upon to take notice of it. The learned Judge Ordinary then adverted to the provisions of sects. 30 & 31, and said: I am satisfied that the case of the petitioner has been proved, and I do not find that the petitioner has been in any way accessory to, or conniving at, the adultery complained of, nor that she has condoned the adultery, nor that the petition has been presented or prosecuted in collusion with the respondent. The petitioner is therefore entitled to a decree *nisi* for the dissolution of her marriage.

CASES

IN THE

COURT OF PROBATE.

1862. February 11.

In the Goods of MATTHEW LEESE.

In the Goods of MATTHEW LEESE (deceased), on Motion.

Two Testamentary Papers.—Appointment of Executors.—No Revocation.

In February, 1859, L. duly executed a testamentary paper, whereof he appointed W. Leese, E. Knight, and John Wright, executors. In October, 1860, he made another testamentary paper, disposing in a different manner of his personal property, but not affecting realty, which was dealt with by the first paper; of the second paper he appointed the same W. Leese and Thomas Devall, executors.

HELD, that the second appointment of executors was no revocation of the first appointment, and that, as the bare nomination of executors entitles a paper to probate, leave should be reserved, on the second set of executors taking probate of the two papers as together containing the last will and testament of the deceased, to the first set of executors to come in and prove.

In this case, Matthew Leese duly executed a "last will and "testament" on the 24th of February, 1859, by which he bequeathed and devised all his personal and real estate to William Leese, Edward Knight, and John Wright, upon certain trusts therein expressed, and of which he appointed the said William Leese, Edward Knight, and John Wright, executors.

1862.
February 11.

In the Goods of MATTHEW LEESE.

On the 7th of October, 1860, the deceased duly executed the following testamentary paper:—

"This is the last will and testament of me, Matthew Leese, "late of Sandon, in the county of Stafford, but now of New- "castle-under-Lyme, in the said county, gentleman. I direct "that all my just debts, funeral and testamentary expenses, "be paid by my executors hereinafter named. I give to my "sister, Harriet Devall, £50, and Sampson Devall £10, and "subject thereto I give and bequeath all and singular my per- "sonal estate and effects unto my three daughters, share and "share alike, to be paid to them on their respectively attaining "the age of twenty-one years; and I appoint Thomas Devall "and William Leese, of Sandon-wood, executors of this my "will; in witness whereof," etc.

Dr. Spinks moved for probate of these two instruments, as together containing the last will and testament of deceased, to be granted to the executors appointed in the second paper.

SIR C. CRESSWELL: The first will disposes of personalty and realty, and contains an appointment of executors; the second will deals with the whole of the testator's personalty, and so far, therefore, puts an end to the first will, which, if it operated only as a devise of realty, would not be entitled to probate; but the second will does not revoke the appointment of executors contained in the first, and the mere appointment of executors entitles a paper to probate. The executors of the second will are entitled to ask for probate of the first as well as of the second will. They may take it, leave being reserved to the executors under the first will to come in and prove.

Dr. Spinks submitted that, though the appointment of additional executors might not be a revocation of other executors appointed by an earlier paper, yet that where one of the original executors—as here William Leese—is re-appointed

1862. February 11. with a new co-executor, it amounted to a revocation of the first set of executors.

In the Goods of MATTHEW LEESE.

SIR C. CRESSWELL: If so, I am inclined to think that the executors under the second will would, in the present case, be entitled only to probate of that will. The motion had better stand over to allow inquiry to be made as to the practice in the registry. *Cur. adv. vult.*

February 18. SIR C. CRESSWELL: In this case, Dr. Spinks suggested that the re-appointment in a testamentary paper of later date of one of the executors of a former will with a new co-executor, amounted to a revocation of the appointment of executors in the first testamentary paper; I have looked in vain for any authority for saying that such a nomination would operate as a revocation of the appointment of the first set of executors. In this case, therefore, if the executors of the second paper take probate of the two papers, leave must be reserved to the executors of the first paper to come in and join in probate.

February 18. In the Goods of THOMAS COLLIER (deceased), on Motion.

In the Goods of THOMAS COLLIER.

Executor out of Jurisdiction.—Limited grant under 38 *Geo. III. c.* 87, *and Probate Acts.—Personal Representative of Legatee.*

Hamilton 1 P&D 1

The Court will make a limited grant to the personal representative of a legatee, the executor being out of the jurisdiction, though the legatee only is mentioned in 38 Geo. III. c. 87.

In this case, Thomas Collier died on the 17th of April, 1852, leaving a will, wherein William Smith Richards and John Briggs were appointed executors, who duly proved the will in the Consistorial Court of Chester. Richards died in

February, 1861, and Briggs left the country for Australia more than seven years ago, and has not since been heard of.

1862. February 18.

In the Goods of THOMAS COLLIER.

The deceased, by his will, among other things, bequeathed legacies of £50 each to Robert and John Collier, his grandsons, on their attaining the age of twenty-one years, with interest, etc. Robert Collier came of age in November, 1860, but died in October, 1861, without having received the legacy. The whole of the estate had been dealt with under the will except a sum of £118. 11*s.* 9*d.* standing in the name of the deceased in the Manchester and Salford Bank, set apart to meet the above legacies.

The present application was to grant a limited administration with the will annexed to Samuel Collier, the father of the legatee Robert Collier, the said Samuel Collier having taken out letters of administration to Robert Collier.

Dr. Swabey moved the Court accordingly. The case falls within the principle of the following Acts, though it may not be literally within the terms of the Act first cited:—By 38 Geo. III. c. 87, it is enacted, "That at the expiration of "twelve calendar months from the death of any testator, if "the executors or executor to whom probate of the will shall "have been granted, are, or is then, residing out of the jurisdiction of his Majesty's courts of law and equity, it shall be "lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditors, next "of kin, or legatee, grounded on affidavit hereinafter mentioned, to grant such special administration as hereinafter is "also mentioned," etc. This administration was limited to exhibiting a bill in equity. By the Probate Act, 1857, sect. 74, it is enacted that, "The provisions of an Act passed in "the 38th year of his late Majesty King George III. c. 87, "shall apply in like manner to all cases where letters of administration have been granted, and the person to whom "such administration shall have been granted, shall be out of

1862. February 18.

In the Goods of THOMAS COLLIER.

"the jurisdiction of her Majesty's courts of law and equity." By the Court of Probate Amendment Act, 1858, sect. 18, it is enacted that, "The provisions of an Act passed in the 38th "year of George III. c. 87, and of the Court of Probate Act, "shall be extended to all executors and administrators residing "out of the jurisdiction of her Majesty's courts of law and "equity, whether it be or be not intended to institute proceed- "ings in the Court of Chancery," etc. The only question seems to be, whether the personal representative of the legatee is not entitled to a limited grant under these statutes, as well as the legatee mentioned in the Act of Geo. III.

SIR C. CRESSWELL: I think the case comes within the spirit, if not the letter, of the Act. You may take the administration with the will annexed, limited to deal with the sum set apart to meet the two legacies.

March 11.

BRANDRETH v. BRANDRETH AND WIFE.

BRANDRETH v. BRANDRETH AND WIFE.

Suit for Revocation of Probate.—Defendant to deliver Issue and move for Directions as to mode of Trial.—Rules 23 *and* 24 (1857).—*Issue to Assizes.—Affidavit.—Practice.*

In a suit for revocation of probate the defendant propounding the will should deliver the issue, and move for directions as to mode of trial. The Court will not direct an issue to the assizes except upon an application supported by affidavit.

This was a suit instituted by the plaintiff as one of the next of kin of Thomas Brandreth (the deceased), for the revocation of a probate granted by the Prerogative Court of Canterbury of the will, and one codicil thereto, of the said Thomas Brandreth, on the 17th of April, 1857. The defendants had brought

1862.
March 11.

BRANDRETH
v.
BRANDRETH
AND WIFE.

the probate into the registry in obedience to the usual citation, and then propounded in a declaration the will and codicil, of which probate in common form had been granted, together with two other codicils to the will. The plaintiff had filed pleas to the declaration, alleging undue influence, fraud, and incapacity, to which the defendants had replied on the 22nd of February last, and delivered the issue on the same day. On the 1st of March they gave notice to the plaintiff of their intention to take the directions of the Court as to the mode of trial.

Dr. Wambey, on behalf of the defendants, moved the Court to direct an issue to be tried before the judge of assize, by a special jury, to be holden in Liverpool, in and for the southern division of the County of Lancaster.

Dr. Spinks, contrà: There are two objections to this motion. The issue has been delivered, and the motion for directions as to mode of trial is made by the defendants. But by Rule 22 (1857) the issue is to be delivered by the plaintiff, and by Rule 23 the plaintiff, and not the defendant, within a certain time, is to move the Court for directions as to the mode of trial.

SIR C. CRESSWELL: In a suit for revocation of probate the plaintiff is only plaintiff nominally. The defendant is really so, by propounding the will. I have already decided in chambers that the defendant in these suits is the proper person to deliver the issue and move for directions as to the mode of trial. I adhere to that decision.

Dr. Spinks: The next objection to the motion is, that the defendants do not state upon affidavit any reason why the cause should be tried at the Liverpool assizes instead of in this Court. I apply for it to be tried in this Court.

1862.
March 11.

BRANDRETH
v.
BRANDRETH AND WIFE.

SIR C. CRESSWELL: I cannot grant an application to send an issue to the assizes where there is no affidavit in support of the application. The cause must therefore be tried in the Court of Probate.

March 18.

In the Goods of JAMES WHITE SAWTELL (deceased), on motion.

In the Goods of JAMES WHITE SAWTELL.

Appointment of Executor.—Misdescription.—20 & 21 *Vict. c.* 77, *s.* 73.

Where an aged testator gave instructions that William George, of 4, Finsbury Square, watchmaker, should be his executor, and, on the death of the testator, it appeared that neither he nor his family knew any one of that name, and that no such person could be found or heard of at that address, the Court granted letters of administration, with the will annexed, to one of the residuary legatees, there being no appointment of an executor willing and competent to take probate.

James White Sawtell, formerly of 16, Brunswick Place, City Road, died on the 27th of January, 1862, at the age of seventy-six, leaving a will of the 24th of January, 1862. By the will, which was duly executed, he divided all his property, with the exception of two small legacies, amongst his nephews and nieces, and he appointed as his executor William George, of No. 4, Finsbury Square, watchmaker. The will began with the words, "This is the last will and testament of me, James "White, of No. 16, Brunswick Place," and in the attestation clause the testator was again described as "James White." The signature was written in a very scrawling, illegible manner, and the deceased had made his mark beneath it.

From the affidavit of John Jones, clerk to Mr. Mills, solicitor, it appeared that, on the morning of the 24th of January, Louisa Middlebrook, the daughter of the landlady of the house

1862.
March 18.

In the Goods of JAMES WHITE SAWTELL.

where the deceased was lodging, called at the office of Mr. Mills, in Brunswick Place, and requested Jones to come immediately to No. 16, Brunswick Place, for the purpose of making the will of an old gentleman (without mentioning his name), who was lodging there, and who had driven it off until the last moment, and who, she was afraid, would not long survive. That Jones, accordingly, at once went to No. 16, Brunswick Place, and was, by the said Louisa Middlebrook, shown into the bedroom of the deceased (without his name being mentioned), and, from him, took down in writing the following instructions for making his will:—namely, "James "White, of No. 16, Brunswick Place, City Road, gentleman, "—nephews and nieces all the residue of my estate, £50 to "Mrs. Middlebrook, £20 to Louisa Middlebrook.—William "George, of No. 4, Finsbury Square, watchmaker, executor." That the said deceased, though very aged and infirm, and speaking with great difficulty, appeared perfectly to understand what he was doing, and on Jones asking him whether the said William George, whom he had appointed as his executor, was the occupier of the house, No. 4, Finsbury Square, he replied that he was not, but only a lodger; and with reference to the two legacies to Mrs. and Miss Middlebrook, he asked Jones's opinion as to what he should leave them, they having had a great deal of trouble with him and having been very attentive, to which Jones replied that it was a question for himself, and also depended upon his means, when he stated there was plenty, and ultimately decided upon the legacies of £50 and £20 mentioned in his will; and on Jones requesting him to furnish him with the names of his several nephews and nieces, he said he could not then recollect them. That Jones, immediately upon receiving the above-mentioned instructions, returned to Mr. Mills's office, and handed the same to Mr. G. Lockyer, another of Mr. Mills's clerks, who at once prepared from the instructions written down the will in question; that Mr. Lockyer and

1862. March 18.

In the Goods of JAMES WHITE SAWTELL.

Jones then proceeded to No. 16, Brunswick Place, for the purpose of getting the will executed, and upon being shown into the bedroom of the deceased, found Mrs. Middlebrook there, whom the deceased requested to withdraw; Jones then read over the said will to him, which he appeared to understand; and on being asked whether it was in accordance with his wishes, he expressed his approval thereof; and Louisa Middlebrook, on being called, came into the testator's room, and assisted him to sit up in bed for the purpose of signing the will; and upon a pen being placed in his hand he affixed his signature thereto, but which appeared so unlike the name of James White that it was thought expedient for him to affix his mark to such will, which he accordingly did, and the will was then duly attested by George Lockyer and Jones, and the said deceased requested Jones to take his will to Mr. Mills's office for safe custody.

George Lockyer and Louisa Middlebrook had also made affidavits confirming Jones's statement respecting the execution of the will.

There were other affidavits proving the identity of James White Sawtell with the James White named in the will, and showing that no such person as William George, of 4, Finsbury Square, was known to the deceased, or to any of his friends and relatives, and that no one could be discovered in any respect answering to the description of the executor contained in the will.

All the next of kin of the deceased, and the persons entitled in distribution, who were also the residuary legatees, had filed a consent to the grant of administration with the will annexed being made to Samuel Francis Brough, one of the nephews and next of kin, and residuary legatees.

Mr. R. Searle moved for a grant of administration with the will annexed to S. F. Brough. The appointment of an executor, who did not exist, was no appointment. The grant might

therefore be made to the residuary legatee, and the appointment of an executor having been inserted under a mistake, might be omitted from the will annexed to it.

1862. March 18.

In the Goods of JAMES WHITE SAWTELL.

SIR C. CRESSWELL: I cannot take such a liberty with the will as to omit the appointment. As all the parties interested consent, I will make the grant as prayed, the person having died "leaving a will affecting personal estate, but without "having appointed an executor thereof willing or competent "to take probate."

Bunsheman 3 PRD 139

In the Goods of MARY WEIR (wife of PETER WEIR), deceased (on Motion).

March 11 & 25.

In the Goods of MARY WEIR.

Protection Order for Wife's Earnings.—Minor Children. —Guardian.—Administration.

Where the wife had obtained a magistrate's order protecting her property and earnings, since April, 1851, and died intestate, leaving minor children, the Court granted administration to the uncle of the children, elected by them guardian for that purpose, though the husband was alive.

In this case, Mary Weir died intestate, leaving her husband her surviving. On the 22nd of March, 1860, she obtained an order from one of the metropolitan magistrates protecting all property, earnings, moneys, and chattels acquired by her since the 5th of April, 1851, when her husband, Peter Weir, had deserted her. On the 30th of March, 1860, the order was duly entered by the Registrar of the Bloomsbury County Court, and remained in force at the time of Mary Weir's death. The deceased also left two sons between the ages of fifteen and twenty-one years, who had, by an instrument under their hands and seals, elected William Gill, their lawful uncle, to

1862. March 11 & 25.

In the Goods of MARY WEIR.

be their curator or guardian, for the purpose of taking out letters of administration of the personal estate and effects of the deceased, for their use and benefit, and till one of them shall attain the age of twenty-one years. The uncle was willing to act, and had made the usual oath, but the registrar wished the opinion of the Court to be taken as to whether the father's right to the guardianship of the children was ousted by the protection order. The last sentence of the 21st section of the Divorce Act, 1857, is: "If any such order of protec-"tion shall be made, the wife shall, during the continuance "thereof, be, and be deemed to have been, during such de-"sertion of her, in the like position in all respects with regard "to property and contracts, and suing and being sued, as she "would be under this Act, if she obtained a decree of judicial "separation." The 25th section enacts that, "in every case "of judicial separation, the wife shall, from the date of the "sentence, and whilst the separation shall continue, be con-"sidered as a *feme sole* with respect to property of every de-"scription which she may acquire, or which may come to or "devolve upon her; and such property may be disposed of by "her in all respects as a *feme sole;* and, on her decease, the "same shall, in case she die intestate, go as the same would "have gone if her husband had been then dead; provided that "if any such wife should again cohabit," etc. The 26th section declares that, "whilst judicially separated, the wife shall be "considered as a *feme sole* for the purposes of contract, suing "and being sued," etc.

Dr. Waddilove moved the Court to decree letters of administration of the deceased to the guardian elected by the minor children, for their use and benefit, etc.

SIR C. CRESSWELL: The difficulty is, whether the words of the Act meet the case. Could infant children, while the father is alive and willing to act, elect a guardian *ad litem?* The motion may stand over.

1862.
March 25.

In the Goods of MARY WEIR.

Dr. Waddilove renewed the motion. He cited, *In the Goods of John Ewing*, 1 Hagg. 381, the marginal note of which is: "Administration *durante minoritate* of children in the East "Indies decreed to the uncle, resident in Ireland, he giving "full justifying security. The grandfather, to whom, as next "of kin, the grant would naturally pass, being upwards of "eighty, and also resident in Ireland." In that case the uncle was nominated guardian by the Court. It seems an authority for passing over, under certain circumstances, the person ordinarily entitled,

SIR C. CRESSWELL: The grant may pass as prayed.

In the Goods of LETITIA LOVEGROVE, Spinster (deceased), on Motion.

March 18 & 25.

In the Goods of LETITIA LOVEGROVE.

Mutual Will.—Survivor.—Probate.

B. and C., sisters living together, executed a testamentary paper to the effect that the survivor should have all that remained of their property at the death of the first deceased, and that at the death of survivor it should be divided amongst certain relations. C. survived B., and died without having altered or revoked such paper, and the Court granted administration with the will annexed, as the last will and testament of C.

In this case the deceased, Letitia Lovegrove, died on the 18th of June, 1861, leaving the following testamentary paper:—

"Peckham, January, 1858.

"We, Hannah Lovegrove and Letitia Lovegrove, at present "living at No. 8, Pitt Street, Peckham, being desirous that, "as we are now living mutually together upon the joint "savings of each other, at the death of either, whichever it

1862. March 18 & 25.

In the Goods of LETITIA LOVEGROVE.

"may please Almighty God to take first, the survivor should "have all that remains, and we further desire that at the "death of the last survivor, should there be any money left "at her decease, we wish it to be divided between our nephews "and niece hereinafter named.

"William Brown, son of our eldest sister, Lucy Brown, re- "siding at Stubbing House, Bisham, near Maidenhead, Berks, "to have double the amount of any of the next named, and "we further desire the remainder to be equally divided be- "tween our other nephews and niece; namely,—

"John Lovegrove, } Residing at No. 4, Martha Street,
"William Lovegrove, } Camberwell.

"Lydia Roffe, residing at Nunhead, Peckham, whose re- "ceipt shall be a sufficient discharge, children of our eldest "brother, Stephen Lovegrove.

"Charles Lovegrove, son of our brother, James Lovegrove, "residing at Burghfield Common, near Reading, Berks.

"Joseph Lovegrove, residing at No. 1, Triangle, Southamp- "ton Street, Camberwell.

"William Lovegrove, residing at No. 1, Denmark Road, "Camberwell, sons of our brother, Charles Lovegrove; and we "further desire our household furniture and other effects to "be divided as follows:—

"William Brown to have the silver watch, two teaspoons, "one tablespoon, Life of Christ, Pilgrim's Progress, Dr. "Hawker's Portions, tea-chest.

"Charles Lovegrove—The trunk as packed and directed.

"John Lovegrove—One pair sheets, one blanket, the small "chest of drawers with brass handles, and deal table, wash- "hand stand, jug and basin, pair of pictures.

"William Lovegrove, son of Stephen—One pair sheets, one "blanket, one bed, one mattress, one mahogany dining-table, "garden tools, small nest of four drawers.

"Joseph Lovegrove—Two silver teaspoons, one pair sheets, "one blanket, mahogany chest of drawers with knobs, two "armchairs.

1862.
March 18 & 25.

In the Goods of LETITIA LOVEGROVE.

"William Lovegrove, son of Charles—Two silver teaspoons, "one pair sheets, one blanket, one bed-chair, two pillows.

"Lydia Roffe—One pair sheets, one blanket, small mattress, "four flat-irons, Italian iron; and we further desire that Eliza- "beth Ash receive £5, provided she is with us or either of us "at the death of the last survivor, and that she divide the "above-mentioned goods.

"Signed in the presence of each other and of both the "undersigned.

"HANNAH LOVEGROVE, × her mark.
"LETITIA LOVEGROVE, × her mark.

"Witnesses,
"MARY NICHOLSON, × her mark.
"ELIZABETH ASH."

From the affidavit of John Lovegrove, it appeared that Hannah Lovegrove died in April, 1858. At the death of Letitia the property consisted of £200 Consols, which had stood in the joint names of the two sisters, but Hannah had been "made dead" in the Bank books, and furniture of the value of about £5.

Dr. Swabey moved for letters of administration with the will annexed, as the last will of Letitia Lovegrove, spinster, to be granted to John Lovegrove, her lawful nephew and one of her next of kin, and one of the persons entitled to the residue of her personal estate undisposed of by the said will. In *Hobson* v. *Blackburn and Blackburn*, 1 Add. 274, it appears that a similar paper was proved as the will of Joshua Hobson (who was in that case the first of the mutual testators who died), he having died without having altered or revoked his part thereof. In the present case the survivor has died without altering or revoking her part of the document, which is, whatever its effect may be, her will.

In the Goods of Stacey, Deane 6, and *In the Goods of Joseph Raine*, 1 Swab. & Trist. 144, were also cited.

Cur. adv. vult.

1862. March 25. SIR C. CRESSWELL: I think in this case the precedent cited warrants the grant prayed.

In the Goods of LETITIA LOVEGROVE.

March 4. In the Goods of AUGUSTUS TURRELL (deceased), on Motion.

In the Goods of AUGUSTUS TURRELL.

Double Probate.—Refusal to produce Probate and account of Estate.—Citation against Executor.—Practice.

Where an executor had proved a will (power being reserved to his co-executors to come in and prove it), upon his refusal to produce the probate and an account of the estate in respect of which it had been granted, so as to enable a co-executor to prove the will without payment of probate duty, the Court directed a citation to issue against him.

Augustus Turrell died in May, 1861, at Hampton Court, leaving a will, whereof he appointed his sons, Samuel Turrell, Adolphus Turrell, James Turrell, and Thomas Cross, executors.

On the 4th of June, 1861, Samuel Turrell alone proved the will in the principal registry, power being reserved to the other executors to come in and prove thereafter.

James Turrell, one of the other executors, was now desirous of proving the will. For that purpose he had been sworn as an executor to an official copy of the will under seal of the Court, but in order to obtain the usual free mark or stamp to exempt him from paying probate duty, the Inland Revenue Office at Somerset House required the production of the probate granted to Samuel Turrell, with a memorial setting forth the nature and amount of the property in respect of which such first probate was granted.

Several applications had been made to Mr. Samuel Turrell for the production of the first probate, and to furnish the account, as required by the Inland Revenue Office, without

effect. Notice had also been given to him in writing, that, if he persisted in refusing to comply with the application, proceedings would be taken against him in the Court of Probate.

1862.
March 4.

In the Goods of AUGUSTUS TURRELL.

Dr. Tristram moved the Court to direct a citation to "issue, "calling upon the said Samuel Turrell to bring in the probate, "with an account of the personal estate and effects of the "testator, in respect of which such probate was granted." If the motion was not granted, great inconvenience and expense would accrue to the testator's estate.

SIR C. CRESSWELL: The estate is a small one. There is no reason why it should be put to the expense occasioned by the payment of probate duty twice over. I will grant the motion.

Dr. Tristram asked for Mr. Samuel Turrell to be condemned in the costs of the motion. His refusal to comply with the requirements of the Inland Revenue Office was unreasonable.

SIR C. CRESSWELL: I shall make no order condemning him in costs until he has complied with the citation; and I will then hear what he has to say on the subject.

In the Goods of SARAH WHITE, Widow (deceased), on Motion.

March 11.

In the Goods of SARAH WHITE.

Administration.—Parties entitled resident in Georgia.—No Communication between England and Georgia by reason of the Blockade.—Property not perishable.—73rd Section of Probate Act.

A. died in England intestate, leaving two children, the only persons en-

1862. March 11.

In the Goods of SARAH WHITE.

titled to her effects, who were resident in Georgia. She left money in the Funds and in a savings-bank, a small sum due to her, and a little furniture:

The Court refused to make a grant to B., her nephew, for the use and benefit of her children, although communication with her children from England was cut off by reason of the blockade of the southern ports of the States, on the ground that the property was not perishable, and that there were no special circumstances to justify the Court in departing from the ordinary practice.

Sarah White, late of Millpond Street, Bermondsey, in the county of Surrey, died on the 22nd of January, 1862, a widow, and intestate, leaving Sarah Ann Aust, widow, and William Dover Maccaw, her natural lawful and only children, and the only persons entitled to her personal estate.

Sarah Ann Aust and William Dover Maccaw were resident in the State of Georgia, in America, and in consequence of the civil war at present waging between the Northern and Southern States, and the blockade of the ports of the Southern States, there was, during the present aspect of affairs, no reasonable prospect of being able to communicate with them from this country. The present estate of the deceased consisted of £36. 11*s.* 9*d.* in the Southwark Savings-Bank, £150 Consols, £20 money owing to her, and furniture of the value of £10.

Henry William Cridland, a nephew of the deceased, who had been on very intimate terms with her for many years past, and who had consented a day or two before her last illness to be sole executor of a will she contemplated making, and was with her at the time of her death, had, in the absence of her children, made arrangements for and paid the expenses of her funeral (£17. 6*s.*). There was a sum due to her medical attendant, which was the only other claim against her estate. The deceased's nearest relation, resident in this country, was a sister, who declined to interfere in her affairs.

Dr. Spinks moved for a grant of administration of the personal effects of the deceased to the said Henry William Crid-

land for the use and benefit of Sarah Ann Aust and William D. Maccaw during their residence from this country, or until they or one of them should apply for and procure letters of administration of the effects of the deceased, on his exhibiting an inventory and giving justifying sureties. The children of the deceased had no attorney or agent in this country.

1862. March 11.

In the Goods of SARAH WHITE.

SIR C. CRESSWELL: Have you any authority for the grant prayed?

Dr. Spinks submitted that it might be made under the 73rd section of the Probate Act.

SIR C. CRESSWELL: That section is not applicable to this case. There are no special circumstances to justify me in making the grant under it. The property of the deceased is not perishable: it consists of money in the Funds and in a savings-bank, bearing interest. I don't see that there is any occasion for me to depart from the ordinary practice and make a fresh precedent in this case.

HARRIS AND ANOTHER *v.* BRADBURY AND HALLADAY.

March 25.

HARRIS AND ANOTHER *v.* BRADBURY AND HALLADAY.

Attachment.—Married Woman condemned in Costs.—No separate Property.

Where the Court had condemned the defendants in costs, and had made an order upon them for the payment of the same, it refused to direct an attachment to issue against them for non-compliance with that order, on their stating on affidavit that they were married women and had no separate property.

The plaintiffs in this case propounded the will of Jane Goodman deceased, dated the 18th of August, 1859, as the executors named therein.

1862.
March 25.

HARRIS AND ANOTHER v. BRADBURY AND HALLADAY.

The defendants (Mrs. Bradbury and Mrs. Halladay) contested the validity of this will on several grounds. The Court pronounced for the will, and condemned the defendants in costs. The plaintiff's costs were taxed at £78. 7*s*. 2*d*., and an order for the payment of those costs had been made upon the defendants, who had failed to comply with the order.

Dr. Spinks moved the Court to direct an attachment to issue against the defendants for non-payment of the costs.

Dr. Wambey contrà: I have affidavits from both of the defendants stating that at the time of the commencement of the suit they were and still are married women; that their husbands are living within the jurisdiction of the Court, and that they have no separate property. This, I submit, is a sufficient answer to the motion. If the plaintiffs had wished to have secured themselves in respect of costs, they should have made the husbands parties to the suit.

SIR C. CRESSWELL (to *Dr. Spinks*): Have you any answer to make to this?

Dr. Spinks: I don't ask the Court to attach the defendants for non-payment of the costs, but for disobedience to an order of the Court, which is equivalent to a contempt of Court.

SIR C. CRESSWELL: At common law a capias may go against a married woman for costs, but upon proof that she has no separate property she is entitled to her discharge. I can only enforce an order of this Court in the same manner as orders are enforced by the Court of Chancery. Is there any instance of a married woman having been attached by order of the Court of Chancery for non-payment of costs?

Dr. Spinks: I am not aware that there is any such instance.

1862.
March 25.

HARRIS AND ANOTHER v. BRADBURY AND HALLADAY.

There are instances of married women being attached in Chancery for failing to comply with other orders of Court.

SIR C. CRESSWELL: I reject the motion.

Dr. Wambey asked for the plaintiffs to be condemned in the costs of the motion.

SIR C. CRESSWELL: I cannot condemn the plaintiffs in costs.

March 4 and April 16.

In the Goods of FRANCIS OWSTON.

In the Goods of FRANCIS OWSTON (deceased), on Motion.

A Deaf and Dumb Testator.—Will.—Instructions given by Signs.—Requisites of Affidavit.

Where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the Court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him, and ultimately refused to grant probate on motion.

Francis Owston, a labourer, who died on the 6th of January, 1862, was deaf and dumb, and could neither read nor write. On the 7th of February, 1857, he sent for Robert Bradley, an acquaintance of forty years' standing, and who was able to communicate with him by signs and motions, to assist him in making his will. Robert Bradley went over to his house, when he instructed him, by means of signs and motions perfectly understood by both of them, that he wished to leave his property to his nephew, Richard Mosey Owston, subject to a proviso that he should allow his, the testator's, wife a suitable allowance. Robert Bradley then inquired of the testator,

1862. March 4 and April 16.

In the Goods of FRANCIS OWSTON.

by signs and motions, if he wished to leave anything to any one else, and he gave him to understand he did not. Norwood Lawson, since deceased, a schoolmaster, was present, and wrote out the will according to these instructions. Robert Bradley then read over the will, and by signs and motions explained it to the testator, who expressed to him by signs and motions that he perfectly understood it, and that it was in accordance with his wishes. The testator then made his mark to the said will in their presence, but they did not attest it.

Afterwards, on the same day, Owston Rounding, a nephew of the testator, and who was able to communicate with him by signs and motions, and Mary Cooper, being together present with the testator, the testator acknowledged his mark in their presence, making Owston Rounding to understand that it was his will which he had so signed with his mark, and that he wished him to attest it, whereupon they both subscribed their name to it in the testator's presence. These facts were verified by affidavit.

Dr. Spinks moved for probate of the will to be granted to Richard Mosey Owston, the sole executor named therein.

SIR C. CRESSWELL: This is a very singular case. Robert Bradley does not state the nature of the signs by which he communicated with the testator, whether he conversed with his fingers or not. It does not appear that he was habitually conversant with deaf and dumb people. I shall require a further affidavit of the nature of the signs and motions with which Bradley communicated with the deceased before I grant the motion. I should like also to have the consent of the party entitled in the event of intestacy. Let the motion stand over.

April 16. *Dr. Spinks* renewed the motion on the following further

affidavit of Robert Bradley:—"That my late father was the "occupier of a farm at Thornholme, in the county of York, "comprising about 400 acres of land, for nineteen years, and "after leaving that farm removed to Wetwang, in the same "county, and occupied a farm there for eleven years, and that "the said Francis Owston, the testator, who was deaf and "dumb, was a labourer in the employment of my said father "at Thornholme and Wetwang for a period of twenty-five "years, namely, from the year 1814 to the year 1840, and "during part of that period resided in the house of my said "father. That the said testator used to take me to Burton "Agnes School when I was a child, and from seeing him "daily for upwards of twenty years I learnt to converse with "him by signs and motions, making letters on the palm of "my hands, and by the deaf and dumb alphabet. That all "my brothers and sisters could also understand and converse "with him by signs and motions, but none of them so well as "I could. That while the said testator was in the employ of "my said father, he (the said testator) taught me to plough, "to shear sheep, and to play at whist, he being a very good "whist player. That I frequently sent him on numerous "errands, and frequently sent him into my father's fields to "fetch up a particular horse, and he has gone away alone and "brought it back without any other means of information "than the signs and motions which I had used. That when "I marked with the finger on the palm of the hand the name "of any person the said testator was acquainted with, he "knew it directly, and would give me to understand that he "did so by making signs indicative of the trade or business of "such person. That the said testator could and did also con- "verse with me by these signs and motions, and give me in- "formation as to my grandfather, and told me his age. That "when I attended at the house of the said testator to in- "terpret for him on the making of his will, as mentioned "and set forth in my affidavit, sworn herein on the 12th of

1862.

March 4 and April 16.

In the Goods of FRANCIS OWSTON.

1862. March 4 and April 16.

In the Goods of FRANCIS OWSTON.

"February, 1862, the said testator used both signs and letters "on his hand; he made signs indicating that all his money, "furniture, and everything he possessed, was to be given to "his nephew, Richard Mosey Owston, who was then present, "and marked his said nephew's initials on his hand, putting "his finger in his mouth, which was a sign that the person he "referred to was a relation. The said Richard Mosey Owston "had attended to the said testator's business matters for some "time, and was present at the testator's request, and the tes- "tator pointed to him as the person he wished to have all his "property. That the said testator had separate signs or "marks for gold, silver, and copper; for gold he touched his "neckerchief, silver his shirt, and copper the buttons of his "coat. He used all these signs, touched most of the furni- "ture, and gave me, by aid of the marks and signs, to under- "stand they were all for his said nephew. When I replied to "that effect, he understood at once, and expressed himself "satisfied. That I am informed (and believe it to be true) "that the only personal estate of which the said testator died "possessed, consisted of his household furniture (of trifling "value) and the sum of £50 due on note. And I further "make oath and say, that the said testator was a widower at "the time of his death, and left no issue, and that the next of "kin of the said testator at the time of his death were his "brother, Richard Owston, the said Richard Mosey Owston, "Margaret, the wife of Stephen Cowson, and Jane, the wife of "William Duggleby, the three children of his deceased brother, "Michael Owston, Jane Fairgray and Clarkson Owston, the "two children of his deceased brother John Owston, Michael "Raymond and Mary Ann Raymond, the two surviving "children of his deceased sister Phillis Raymond, and Owston "Rounding (one of the attesting witnesses to the said testa- "tor's will) and Mary Butcher, the two children of his de- "ceased sister Hannah Rounding, all of whom I am informed, "and believe, reside in different parts of the country. That

1862.
March 4 and April 16.

In the Goods of FRANCIS OWSTON.

"none of the relations of the said testator, during the time I "knew him, ever noticed or visited him except the children "of his deceased brother Michael and the said Owston Round- "ing, and that the said testator always expressed great regard "for his said nephew, Richard Mosey Owston, who had at- "tended to his wants for some years."

SIR C. CRESSWELL: I cannot consider this as a sufficiently satisfactory account of the method in which the instructions of the deceased are said to have been taken. I am not inclined to let probate of this paper pass on motion, at least without the consent of the next of kin. *Motion rejected.*

DYKE (Queen's Proctor) *v.* WILLIAMS.

In the Goods of MARY EMSLEY (deceased).

1861.
July.

DYKE (Queen's Proctor) v. WILLIAMS.

In the Goods of MARY EMSLEY.

Queen's Proctor's Suit.—Legitimacy.—Practice.

In a plea of legitimacy, in answer to the Queen's Proctor's declaration of bastardy, the steps of the pedigree must be set out, but it is not necessary to plead that a marriage was solemnized at a particular time and place, and that certain issue was born after the date of the marriage.

This was a question arising on the following pleadings:—

The declaration of the Queen's Proctor stated that Mary Emsley, late of Grove Road, Mile End, in the county of Middlesex, deceased, died on the 13th of August, 1860, intestate; that the said Mary Emsley was a bastard, and died a widow, without having any lawful issue.

To this Samuel Williams, by Richard Chapman King, his attorney, pleaded:—1. That Mary Emsley, late of Grove Road, etc., who died on the 13th of August, 1861, a widow and intestate, was not a bastard. 2. That the said Mary

1861. July.

DYKE (Queen's Proctor) v. WILLIAMS. In the Goods of MARY EMSLEY.

Emsley was the legitimate child of Samuel Williams and Mary his wife. 3. That the said last-mentioned Samuel Williams and the said Mary his wife had issue one other lawful child only, namely, Samuel Williams, who died in the lifetime of the said Mary Emsley, to wit, on the day of ——, leaving him surviving the said Samuel Williams, the defendant, Elizabeth Gotz, wife of — Gotz, Abraham Williams, and Joseph Williams, his natural and lawful and only children, and only next of kin.

This plea was objected to by

Dr. Spinks, on behalf of the Queen's Proctor: Such a plea should allege the time and place of the marriage of the parents and the birth of the respective persons after marriage.

Dr. Wambey: The plea is a sufficient traverse of the declaration, and a sufficient statement of the interest of the party claiming relationship. *Cur. adv. vult.*

SIR C. CRESSWELL (after stating the declaration and plea): This was an application to cause the defendant to set out the particulars of the marriage; but looking at the 9th and 11th forms for contentious business (1857), which give the declaration and plea in an interest cause, I think the plea is sufficient.

1862. February 25 & April 16.

DYKE (Queen's Proctor) v. WALLIS AND OTHERS.

DYKE (Queen's Proctor) v. WALLIS AND OTHERS.

Queen's Proctor's Suit.—Legitimacy.—Practice.

The pedigree of parties claiming to be related to a deceased intestate, as against the Queen's Proctor's allegation of bastardy, must be set

out, but it is sufficient to aver that B. was the legitimate child of A. and his lawful wife, without stating the time or place of the marriage, or the name of the wife, or the date of the birth of B.

1862.
February 25 & April 16.

DYKE (Queen's Proctor) v. WALLIS AND OTHERS.

This was a question on the pleadings in an interest suit. The declaration stated that Sophia Bellis, otherwise Sophia Capell, late of 43, Woburn Place, in the county of Middlesex, died at the said place on the 14th of January, intestate. That the said deceased was a bastard, and died a widow, without leaving any issue.

To this Henry Wallis, James Wallis, and Mary Ann Moir, widow, by Edward Lewis Hooper, their attorney, pleaded:— 1. That they deny that Sophia Bellis, otherwise Sophia Capell, who died on or about the 14th of January last, the deceased in this cause, was a bastard. 2. That the said deceased died intestate, a widow, without child, parent, brother or sister, uncle or aunt, nephew or niece, cousin german, or cousin german once removed, leaving them, the said Henry Wallis, James Wallis, and Mary Ann Moir, widow, her lawful second cousins and next of kin.

Dr. Spinks moved to amend the plea by setting forth the defendant's pedigree, so that issue may be properly joined.

Dr. Swabey: This is not a suit between two private persons asserting relationship to the deceased, but between the Queen's Proctor for the Crown, who alleges a case of bastardy, and the defendants, who claim to be related. In such case the most general evidence of relationship is sufficient; and in *Stote* v. *Tyndall*, 2 Sir G. Lee, 394 (cited 1 Wms. Executors, 379), Sir George Lee decided that it was not necessary to set out a pedigree. *Cur. adv. vult.*

February 25.

SIR C. CRESSWELL said: The case cited by Dr. Swabey last week is not exactly in point. The Crown there denied Mr. Stote's relationship, but did not allege that the de-

1862.
February 25 & April 16.
DYKE (Queen's Proctor) v. WALLIS AND OTHERS.

ceased was a bastard. The present case seems to me to depend upon whether the assertion of bastardy by the Crown is enough to throw the burden of proof on the parties claiming as relations and denying the bastardy. I feel some difficulty on this point, and the case must stand over to see whether any light can be thrown on it from any cases of which the papers may be found in the registry.

March 4.

SIR C. CRESSWELL: The Queen's Proctor has succeeded in finding a precedent exactly in point, showing that the party coming in and setting up a claim against the Queen's Proctor must state a pedigree. The plea must be amended accordingly.

The plea, as amended in compliance with this order of the Court, contained the following additional paragraphs:—

3. That Thomas Millist, by his lawful wife Mary, had legitimate issue, besides other children, two daughters, respectively named Ann and Sarah.

4. That the said Ann Millist became the lawful wife of Frank Capell; that Francis Godman Capell was the legitimate son of the last-mentioned marriage; that Sophia Bellis, otherwise Sophia Capell, the deceased in the cause, was the legitimate daughter of the said Francis Godman Capell by his lawful wife.

5. That the said Sarah Millist became the lawful wife of John Rickernell, and had, besides other issue, a legitimate daughter named Mary, who became the lawful wife of Isaac Wallis, of which last-mentioned marriage the said Henry Wallis, James Wallis, and Mary Ann Moir, the defendants in this cause, are legitimate issue.

Whereupon the Queen's Proctor gave notice of motion to amend the fourth paragraph of the plea, by setting out when, where, and to whom, Francis Godman Capell, the alleged father of the deceased, was married, and the date of the deceased's birth.

Dr. Spinks moved the Court accordingly.

1862.
February 25 & April 16.

DYKE (Queen's Proctor) v. WALLIS AND OTHERS.

Dr. Swabey, in support of the sufficiency of the plea, referring to *Mayo* v. *Brown*, 2 Sir G. Lee, 391, contended that the defendants were now called upon to state in plea more precise circumstances and particulars than it might be necessary for them to prove to establish the legitimacy of the deceased. The Queen's Proctor, at least, could be entitled to no privilege beyond an ordinary suitor. *Cur. adv. vult.*

March 25.

April 16.

SIR C. CRESSWELL: This was a motion for an order on the defendants to amend their plea by setting forth the particulars of the pedigree by which they claimed to be the second cousins of Sophia Bellis, deceased. The Queen's Proctor had declared that Sophia Bellis, *alias* Capell, was a bastard. The defendants traversed that allegation, and in an amended plea set out a pedigree making Thomas Millist the common ancestor—alleging that he left two daughters, and traced their descent from one of them; then averring that the other, named Ann, married F. Capell; that F. G. Capell was the lawful issue of that marriage; and that Sophia Bellis, *alias* Capell, was the lawful daughter of F. G. Capell and his wife.

The application was that the defendants should state when, where, and to whom Francis Godman Capell was married, and the date of the birth of the deceased Sophia Bellis, *alias* Capell. In support of the motion, the papers in a cause of *Her Majesty's Proctor* v. *Thorn and Walker* were produced, where, in an allegation brought in for the defendants, a marriage between A. and B., the parents, was averred, but no precise time or place was fixed. It was also urged that the Queen's Proctor, on behalf of the Crown, could have no motive for desiring to take any unfair advantage, and only wished for an opportunity of ascertaining whether his claim on behalf of the Crown was well founded, without incurring, or causing the defendants to incur, any unnecessary expense.

1862. February 25 & April 16.

DYKE (Queen's Proctor) v. WALLIS AND OTHERS.

On the other hand, I was referred to a case in the second volume of Sir G. Lee's Reports, *Mayo* v. *Brown*, at p. 391, as an authority justifying the general form of plea used in this case.

I think that I must treat the Queen's Proctor in the same manner as any other suitor, and that, if the pleading would be sufficient in answer to a declaration by another suitor, it will suffice against him. The case cited is not precisely in point, but much resembles this. Brown had taken administration to Lady Mayo's mother. She alleged that Brown was not the lawful husband of the deceased, and cited him to bring in his administration. He denied that Lady Mayo was the deceased's legitimate daughter. She propounded her interest, alleged that her mother married Whitgift Aylmer, and that she was the issue of the marriage, but did not fix the *factum* of the marriage, nor the year in which it took place, nor the year in which she was born, but pleaded circumstances from which a marriage and her legitimacy might be inferred; and from the evidence given Sir G. Lee pronounced for her interest, "notwithstanding there was "no actual proof of the marriage of her father and mother, "or of the time of her birth." This sort of pleading would not now be allowed, for it is pleading evidence; but the evidence would be admissible to prove legitimacy, and the decision of Sir G. Lee is an authority for saying that legitimacy may be established by circumstantial evidence, without actual proof of the marriage of the parents or the birth of the issue. That being so, I think I cannot call upon the defendants to fix the *factum* of the marriage, or the time of it, or of the birth of the issue. As at present advised, such would have been my decision if the question had been raised on demurrer, when it might have been questioned on appeal; but, on motion, certainly I cannot order the defendant to amend his plea, as desired by the Queen's Proctor. I am not prepared to say that evidence may not be given that would justify the Court or a

1862.
February 25 & April 16.

DYKE (Queen's Proctor) v. WALLIS AND OTHERS.

jury in finding that the deceased was the legitimate daughter of Francis Godman Capell, although there may not be actual proof of the *factum* of the marriage, or of the time of the birth of the deceased, or of the maiden name of her mother; and, therefore, I think the defendants must be allowed to allege, in general terms, that the deceased was the legitimate daughter of Francis Godman Capell.

Adverting to counts of real actions, I may observe that in writs of right the claimant was bound to show that he was heir, and how he was heir, but marriages were not stated. Thus it sufficed to say that from A. B. the estate descended to C. D., his son and heir, and from him to E. F., his son and heir, and so forth (see *Dumsday* v. *Hughes*, 3 B. & P. 453). I can find no sufficient reason for requiring more in such cases as the present. The motion must therefore be rejected.

In the Goods of CHARLES LORIMER (deceased), on Motion.

May 20.

In the Goods of CHARLES LORIMER.

Executors, acting and non-acting—Executor of acting Executor—20 & 21 *Vict. c.* 77, *s.* 79—21 & 22 *Vict. c.* 95, *s.* 16.

On the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased.

In this case the deceased died in May, 1844, leaving a will, in which he appointed Thomas Oliverson, James A. Forshaw and Thomas Morris trustees and executors, and his wife, Hannah Lorimer, residuary legatee during widowhood, with a power of appointment by will over the whole estate and effects in the event of her not marrying again. Probate was granted by the Consistory Court of Chester in June, 1844, to Forshaw and Morris, power being reserved to Oliverson. Forshaw and

1862. May 20.

In the Goods of CHARLES LORIMER.

Morris acted under the will and died, leaving part of the estate unadministered. Morris, the survivor of the two, died in July, 1860, leaving a will, whereof he appointed certain executors, one of whom, George Marsden, proved the will. Thomas Oliverson died in 1861, having in his lifetime neither renounced probate nor obtained any grant to be made to him.

Hannah Lorimer died a widow, leaving a will and codicil, whereof she appointed Bailey and Chalmers her executors and residuary legatees in trust, who took probate in 1859. In the will and codicil, Hannah Lorimer directed the trustees or trustee for the time being of the will of Charles Lorimer to pay or transfer all the property over which she had a power of appointment by virtue of the will of Charles Lorimer, to Bailey and Chalmers, her executors.

The unadministered effects of Charles Lorimer consisted of a sum of £5405, standing to the credit of his executors, Forshaw and Morris, in the Bank of Liverpool. The bank declined to pay the money until a grant of letters of administration *de bonis non* should be made, and Marsden, the executor of the surviving acting executor of Charles Lorimer, would take no steps to compel the bank to pay the money to him, being advised that he was not the personal representative of the said Charles Lorimer.

The 20 & 21 Vict. c. 77, s. 79, enacts that "Where any "person, after the commencement of this Act, renounces pro- "bate of the will of which he is appointed executor or one of "the executors, the rights of such person in respect of the "executorship shall wholly cease, and the representation to "the testator and the administration of his effects shall and "may, without any further renunciation, go, devolve, and be "committed in like manner as if such person had not been "appointed executor."

The 21 & 22 Vict. c. 95, s. 16, enacts that "Whenever an "executor appointed in a will survives the testator, but dies "without having taken probate, and whenever an executor

1862.
May 20.

In the Goods of CHARLES LORIMER.

"named in a will is cited to take probate and does not appear "to such citation, the right of such person in respect of the "executorship shall wholly cease, and the representation to "the testator and the administration of his effects shall and "may, without any further renunciation, go, devolve, and be "committed in like manner as if such person had not been "appointed executor."

Dr. Swabey now moved the Court to grant letters of administration with the will annexed of the unadministered estate of Charles Lorimer to Bailey and Chalmers, the executors of Hannah Lorimer. The Court will probably reject the motion, as the case apparently cannot be distinguished from that of *The Goods of Robert Noddings*, 2 Swab. & Trist. 15, where a surviving executor, to whom power had been reserved, having been cited and not appearing, the Court held that the executor of an acting executor was the personal representative of the original testator. The present case falls under another clause of the same 16th section, but the principle must be the same. There is an inaccuracy in the report of *The Goods of Robert Noddings*, where the Court is reported to have said: "The "executor of the acting executor seems to be the proper re-"presentative of the original testator, and the grant will be "made accordingly." The effect of that case being that the executor of the acting executor is the representative of the original testator, no grant *de bonis non* was necessary, and none in fact was made. This inaccuracy may have had some share in the view taken by the advisers of the Liverpool Bank in the present case.

SIR C. CRESSWELL: I see no reason to doubt that, under the sections of the Probate Acts referred to, the executor of the surviving acting executor becomes, upon the death of the non-acting executor, the personal representative of the original testator. I must reject this motion.

1862.

May 27 and June 8.

In the Goods of PETER FRANCIS M'CABE (deceased), on Motion.

In the Goods of PETER FRANCIS M'CABE.

Wills and Codicils.—Destruction of later Will.—Reference to and Confirmation of Testamentary Papers by duly-executed Letter.

C. made a will on the 30th of April, 1857, in which he devised to H. a freehold house for life, and the residue of his real and personal estate to B. C., making H. and B. C. executors. In September, 1857, he made a codicil "to my last will of the 30th of April, 1857," by which he left H. £200 in addition to the devise in the will, and left other specific money legacies. On the 13th of February, 1858, he made another codicil referring to his will of 1857, and bequeathed a leasehold house and the furniture therein to H., and otherwise confirmed his will. On the 3rd of June, 1858, he made a will identical with that of 1857, except the substitution of F. C. for B. C.; at the same time he re-executed the codicil of September, 1857, which then purported to be a codicil "to my last will, dated the 3rd of June, 1858." On C.'s death in March, 1862, the will of April, 1857, and the two codicils were found in an envelope sealed and indorsed by C., "sealed the 13th of June, 1860, P. F. M'C." The will of 1858 was not forthcoming, though it had been in testator's possession. There was evidence tending to show that before the beginning of 1860 deceased intended to exclude F. C. and reinstate B. C., and that he had destroyed the will of 1858. In June, 1860, deceased wrote a letter to H. confirming what he had already done by will for her, which letter was signed by him and attested. The Court granted probate of the last will of C., as contained in the letter and the papers found in the sealed envelope.

The deceased in this case died on the 8th of March, 1862, at Hastings. After his death an envelope was found amongst his papers, sealed with his own seal, and indorsed as follows, in his own handwriting:—"Sealed 13th June, 1860. P. F. "M'C." This envelope contained three testamentary papers:—

1. "This is the last will and testament of me, Peter Francis "M'Cabe, late of Hastings, in the county of Sussex, but now

1862.
May 27 and June 8.
In the Goods of PETER FRANCIS M'CABE.

"of Hawkhurst, in the county of Kent, physician. In the "first place, I direct all my debts, funeral and testamentary "expenses to be paid. And I give and devise all that my "messuage or tenement, with the buildings and appurtenances "thereunto belonging, situate and being No. 43, in Wellington "Square, in the parish of St. Mary in the Castle, in Hastings "aforesaid, unto Hannah Blake, my housekeeper, for the term "of her life, for her own sole and separate use, free from the "control, debts, or engagements of any husband she may "marry, she keeping the same in good repair, and insuring "the same from fire. And, subject to the said last-mentioned "devise, I give, devise, and bequeath all my real and personal "estate whatsoever unto and to the use of my nephew, Wil- "liam Bernard M'Cabe, his heirs, executors, etc.; and I ap- "point the said William Bernard M'Cabe and Hannah Blake "executor and executrix of this my will; and I hereby revoke "all other wills by me at any time heretofore made, and de- "clare this to be my last will and testament. In witness "whereof (duly executed), 30th April, 1857."

2. "This is a codicil to the last will and testament, dated "the third day of June,[1] one thousand eight hundred and "fifty-eight, of me, Peter F. M'Cabe, of Hawkhurst, in the "county of Kent. I give to my faithful friend and house- "keeper, Hannah Blake, in addition to the disposition made "in my will, two hundred pounds, as a token of gratitude for "her care and attention to me in various illnesses. I give to "Margaret M'Cabe, widow of my lamented brother, Dr. James "M'Cabe, fifty pounds, and in case of her death to be di- "vided between those of her sons most requiring it. I leave "to E. M'Cabe, son of my late brother, Edward M'Cabe, fifty "pounds. I leave to William Swan, son of the late William "Swan, of the Navy Pay-office, three hundred pounds. I "leave to the then parish priest of Arran-quay Chapel, for

[1] 30th April, 1857. This date was erased, and the above date interlined.

1862. May 27 and June 3.

"the benefit of the poor of his parish, fifty pounds. In "witness my hand this* third day of June, 1858."

(Duly executed and re-executed.)

In the Goods of PETER FRANCIS M'CABE.

3. "This a codicil to the last will and testament of me, "Peter Francis M'Cabe, of Hawkhurst, in the county of "Kent, physician. Whereas, I have by my will, dated the "thirtieth day of April, 1857, given all my personal estate "unto my nephew, William Bernard M'Cabe, absolutely; and "whereas I have lately taken the lease of a house and pre- "mises called Mill-hill Lodge, situate on the West Hill, in "the parish of St. Clement, in Hastings, in the county of "Sussex. Now I hereby give and bequeath all my interest "in and to the said premises and the lease thereof, and all "the furniture and household effects belonging to me which "shall be therein at my decease, unto my housekeeper, "Hannah Blake, her executors, administrators, etc. And in "all other respects I confirm my said will, as witness whereof, "etc., this 13th day of February, 1858 (duly executed)."

From the affidavits of Hannah Blake and Mr. Shorter, solicitor, of Hastings, the following facts appeared:—

That deceased was in the habit of speaking to Hannah Blake about his affairs, and had from time to time mentioned to her the substance of the above papers. That in the early part of 1858, Francis Frederick M'Cabe, son of William Bernard M'Cabe, mentioned in the above papers, visited the deceased at Hastings, soon after which the deceased told Mrs. Blake that he intended to make an alteration of his will in favour of the said Francis Frederick M'Cabe; that on the 3rd of June, 1858, deceased called at Mr. Shorter's office, and produced the will, dated the 30th of April, 1857, and Shorter, from his instructions, prepared a draft will, which was an exact copy of the will of 1857, except the substitution of the names Francis Frederick M'Cabe for those of William Bernard M'Cabe, as the residuary devisee, legatee, and executor

* —— day of September, 1857. Erased and interlined as above.

1862.
May 27 and June 8.

In the Goods of PETER FRANCIS M'CABE.

thereof; and a fresh will was on that day duly executed in accordance with such draft; this draft was kept by Mr. Shorter, and was now before the Court: it revoked "all other "wills by me at any time heretofore made;" at the same time the deceased produced the codicil (paper No. 2 above), and requested Mr. Shorter to witness the re-execution of it, which was accordingly done; the deceased then left the office, taking with him his new will, the re-executed codicil, and the will of April, 1857; no allusion was made to the codicil of the 13th of February, 1858.

In the year 1859, Thomas Frederick M'Cabe again visited deceased, subsequently to which a coolness appeared to grow up between them, and, some time between the month of June, 1859, and the beginning of 1860, the deceased took some papers out of his desk, in the presence of Mrs. Blake, tore up one about the size of a sheet of foolscap, and threw the pieces on the fire, saying, at the same time, "I think William Ber- "nard M'Cabe will be a better friend to you than Francis "Frederick M'Cabe, and he shall have nothing to do with "you or my property." In the month of May, 1861, the deceased told Mrs. Blake that he was about to go to Ireland, and that he should write a letter to her confirming his will. Accordingly, on the 1st of June, he handed to Mrs. Blake the following letter, in his own handwriting:—"West Hill, "1st June, 1861.—Dear Mrs. Blake,—As I contemplate "taking a journey to Ireland, I don't wish, at my time of life "and state of health, leaving anything unsettled that I think "I ought to arrange. I have already made a will, in which I "left to your use and perfect enjoyment my freehold house "and furniture during the full period of your life. I now "write this in confirmation of what I have already done, to "prove to you that there has not been the least change in my "intentions towards you since the time of my making my "will. I have placed the deed of the house in your own keep- "ing." Mrs. Blake suggested it should be witnessed by two

1862. May 27 and June 3.

In the Goods of PETER FRANCIS M'CABE.

persons, or that it would be of no value; the deceased on this went out, and, as appeared by another affidavit, signed this letter, which was duly attested and subscribed by two witnesses; on his return he gave the letter to Mrs. Blake, who kept it. After careful search, no other testamentary papers were forthcoming on deceased's death, except the above.

A proxy of consent from Francis Frederick M'Cabe was filed.

Dr. Swabey moved the Court for probate of the last will and testament of deceased, as contained in the letter of the 1st of June, 1861, the will bearing date the 30th of April, 1857, the re-executed codicil, and the codicil of the 13th of February, 1858. On the facts proved, the letter of the 1st of June, 1861, must be taken as referring to the will of the 30th of April, 1857, and the case falls within the principle laid down by the Judicial Committee in *Allen* v. *Maddock*: "When there "is a reference in a duly executed testamentary instrument to "another testamentary instrument by such terms as to make it "capable of identification, it is necessarily a subject for parol "evidence, and when the parol evidence sufficiently proves that "in the existing circumstances there is no doubt as to the in-"strument, it is no objection to it that by possibility circum-"stances might have existed in which the instrument referred "to could not have been identified." As to the re-executed codicil, it must be admitted that *primâ facie* it is revoked by the revocation of the will to which it describes itself to be a codicil; but from the cases it would seem that this presumption is easily rebutted, and there is nothing conclusive in the description, "codicil to my will, bearing date the 3rd of June," etc. (*Tagart* v. *Hooper*, 1 Curt. 289; *R. Hallowell*, deceased, 4 N. C. 400; *Clogstoun* v. *Walcott*, 5 N. C. 623.) Here the re-executed codicil is not, as regards its contents, dependent on the will to which it professes to be a codicil; an independent effect might be given to all its bequests. Again, both

papers were in the custody of deceased. If there is no direct proof of the destruction of the will of the 3rd of June, 1858, the presumption is that it was destroyed by deceased *animo revocandi;* while the fact that he carefully preserved the codicil is beyond all doubt. On this view of the slight nature of the connection between the codicils and their respective wills, it may be more difficult to uphold the codicil of the 13th of February, 1858; but, on principle, if a codicil is so connected with a will that the revocation of the will is the revocation of a codicil, it would seem that the revival of the will would be the revival of the codicil. Here the codicil of February, 1858, would seem to have been revoked by the general clause of revocation in the will of the 3rd of June, 1858, apart from any revocation of the will of April, 1857. *Cur. adv. vult.*

1862.
May 27 and June 3.

In the Goods of PETER FRANCIS M'CABE.

Sir C. CRESSWELL: In this case I think it must be taken that the will of June, 1858, was destroyed by the deceased, with intention of revoking it, at the time when he seems to have had something of a quarrel with the great-nephew; and I think there is sufficient to show that the will of 1857, and the two codicils, which were found after the deceased's death, sealed up in an envelope, were the testamentary papers which the deceased intended to confirm by the letter of the 1st of June, 1861. Probate may therefore go as prayed.

June 3.

THORNCROFT and CLARKE *v.* LASHMAR.

1862.
May 28 and June 3.

Testamentary Papers.—Paper on the face of it not testamentary. —Burden of proof.—Costs.

THORNCROFT AND CLARKE *v.* LASHMAR.

Where a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burden of proof is on that person to satisfy the Court that it was executed *animo testandi.*

1862.
May 28 and June 3.

Where a legal question fairly arises on the papers of a deceased person, the Court will order the costs of the losing party to be paid out of the estate.

THORNCROFT AND CLARKE v. LASHMAR.

In this case Thorncroft and Clarke propounded the will and codicil, bearing date respectively on the 25th of January, 1860, and the 13th of June, 1861, of Samuel Weller, late of Brighton, as the executors therein named.

Lashmar, by his plea, admitted the validity of the will and codicil, and further alleged that, on the 6th of July, 1861, the said Samuel Weller, deceased, having an intention to make a second codicil to his will, directed the said George Lashmar to write on paper the words and figures following, to wit:— "July 6, 1861. To Mr. George Lashmar. I hereby offer you "the situation of collector and overseer of my property, at a "salary of £3. 3*s*. per week, with house-rent to the amount "of £25 a year, and all rates and taxes clear. I hereby fur- "ther wish that the said George Lashmar shall continue in "the aforesaid office with the same salary as aforesaid after "my decease, and same allowances." The plea further alleged due execution and capacity in the usual terms.

Plaintiffs' replication denied the due execution of the paper of July 6; denied that it was a second codicil of the will of the deceased; denied that deceased intended the said paper writing to operate as a testamentary instrument. Issue was joined on the replication, and the case was now heard before Sir C. Cresswell.

Dr. Phillimore, Q.C., and *Dr. Wambey*, for the plaintiffs.

Dr. Middleton and *Mr. Fitzhugh* for the defendant.

From Lashmar's evidence it appeared that he was Mr. Weller's son-in-law, and for four or five years before his death had looked after and collected the rents of certain leasehold and freehold houses, which were the bulk of Mr. Weller's property,

at a salary of £3. 3*s*. per week, £25 for house-rent, and his rates and taxes paid. Lashmar had expressed dissatisfaction at the precariousness of the employment as depending on Mr. Weller's life, who was towards eighty years of age. On the 6th of July, Mr. Weller sent for him and said, "I hear from "Mr. Thorncroft that you are dissatisfied with your situation. "Mr. Thorncroft is going to Mr. Payne to get another col- "lector to do it for less money. I am sorry it should go out "of the family; go down to Mr. Thorncroft, and tell him to "stop Payne from getting another person." Lashmar went out, and in the course of the morning returned with the paper of the 6th of July, written partly in the handwriting of a clerk of Thorncroft and partly in his own, as far as "rates and taxes "clear," and told Mr. Weller that he had written to Thorncroft, accepting the situation. Weller said,—"I wish you to be my "collector when I am gone. You have four children; I should "be sorry to see you out of work at your time of life." Lashmar asked whether the situation was to continue at the same salary, and on Weller's answering, "Yes; just the same as "now," Lashmar added to the paper the sentence, "I hereby "further wish," etc. Miss Weller, a niece, who was present, asked Lashmar whether she was wanted as a witness. Lashmar said "Yes," and that he should like to have a witness out of the house besides her. He fetched a man named Barrow, who was unable to read or write, and ultimately Mr. Travis, an innkeeper, came, who, after some talk with Mr. Weller, asked him the nature of the document, and read it carefully over to him. Mr. Weller said that was his intention: the paper was signed and attested. Lashmar said,—"I consider this docu- "ment worth £1000;" to which Weller said,—"I am very "glad of it; I hope you will live to enjoy it many years."

On cross-examination it appeared that Lashmar's previous appointment had been noted in a book, which note had been signed or witnessed by Miss Weller and a servant-girl then in the house, but not signed by Mr. Weller; that when the will

1862.
May 28 and June 3.

THORNCROFT AND CLARKE v. LASHMAR.

and first codicil were read after the funeral, Lashmar said nothing about the paper now propounded as second codicil.

Mr. Travis confirmed Lashmar's evidence as to what took place after he (Travis) came into the room.

On behalf of the plaintiffs, Mr. Somers Clarke, solicitor, of Brighton, deposed that he had acted as deceased's solicitor for several years before his death; that deceased first spoke to him about a will shortly before the date of the will of January, 1860; that in the end of October, 1861, deceased sent for witness and told him he wanted to make by codicil a certain provision for his niece, Lucy Weller. Witness said he thought that in the will was a provision nearly to that effect, but that he would look at his will and let him know. Witness found that such a provision was in the will, and wrote to that effect. Witness had the custody of the original will and codicil of the 13th of June, 1861, appointing him one of his executors. In October deceased said nothing about having made another testamentary paper after the 13th of June, 1861.

On this state of facts, *Dr. Middleton* contended that the paper of the 6th of July, 1861, ought to be included in the probate. First, a benefit is conferred by it; secondly, the benefit is dependent on the death of the writer; thirdly, it was the writer's intention that the paper should continue to operate after his death. (*Passmore* v. *Passmore*, 1 Phil. 216.) As to the introductory portion, either it gives a direct benefit or it does not. I should contend that it does not, that it is merely an offer; but if the first part must be taken as conferring an immediate benefit, I rely on the case of *Doe dem. Cross* v. *Cross*, 8 Q. B. 714, of which the marginal note is: "P. being in India in 1840, executed the following instru- "ment, attested by two witnesses: 'Know all men, etc., that "'I make E. my lawful attorney for me and in my name, and "'to my use, to ask, demand, etc., or receive the possession "'of, or produce of, or rents of the freehold of, etc.; and I do "'empower her, the said E., to hold and retain all proceeds of

"'the said property for her own use until I return to England "'and claim possession in person; or, in the event of my "'death, I do hereby, in my name, assign and deliver to the "'said E. the sole claim to the before-mentioned property, to "'be held by her during her life and disposed of by her as "'she may deem proper at the time of her death. At the "'same time I wish it to be understood that I claim all right "'and title to the said property on my arrival in Great "'Britain, when the term of the said E.'s occupancy shall be "'considered at an end. In witness, etc.' The instrument "was acted on as a power of attorney by E. Afterwards P. "died in India, without returning to Great Britain, and left "E. surviving: Held, that the instrument operated on P.'s "death as a devise to E."

BY THE COURT: In the present case the paper directs that Lashmar is to continue in the same office; it seems, therefore, important to determine what the nature of the office was. Was it for life, or *durante bene placito?*

Dr. Middleton: The extent and value of the bequest may be more properly a question for a court of construction.

Dr. Phillimore, Q.C.: In this case there is nothing to show that the deceased had any intention of executing a testamentary paper. I admit that no form or special language is necessary, if a will was intended. Thus the language may become of importance in order to ascertain intention. This paper is an appointment to an office, to discharge certain duties and receive a salary. There is no gift or benefit apart from this office; nothing on which a paper in the nature of a will can operate. Whether, as an agreement or contract, it is binding on the executors to continue Lashmar in the office is another question, which cannot be decided in this Court.

Cur. adv. vult.

1862.
May 28 and June 8.

THORNCROFT AND CLARKE v. LASHMAR.

SIR C. CRESSWELL: In this case, in which Dr. Middleton asked me to include in the probate the letter of the 6th of July, 1861, I have looked at the cases cited, and have considered them with reference to the circumstances of the present one, and I am of opinion that it is not a testamentary paper. When a paper is not clearly testamentary on the face of it, the burden of proof is on those who assert that the deceased intended it to operate as a testamentary paper. (*Griffin and Amos* v. *Ferrard*, 1 Curt. 96; *Coventry* v. *Williams*, 3 Curt. 787.) And in *Passmore* v. *Passmore*, Sir John Nicholl laid stress on the intentions of the writer to be gathered from the instrument itself. The paper now before the Court is not testamentary on the face of it. The appointment was to continue after death the same as in the writer's lifetime; if it commenced in his lifetime, it would not be revocable; that there were two witnesses is of no importance, for a previous appointment had been witnessed in a similar way. The case of *the Goods of Mundy*, 2 Swab. & Trist. 119, which was referred to, was the case of a death-bed request to take effect after death. In *Doe dem. Cross* v. *Cross*, the instrument was clearly divisible into two parts, and the latter part was capable of taking effect as a will. I pronounce against the title of this paper to probate.

Dr. Middleton asked for defendant's costs to be paid out of the estate. It was a mere legal question arising from the papers left by the deceased. (*Pearce* v. *Pearce*, 3 N. C. 150.)

SIR C. CRESSWELL: I think that may be so.

1862.
January 14.

In the Goods of MICHAEL COURT (deceased), on Motion.

In the Goods of MICHAEL COURT.

Will.—Inaccurate Language.—Probate.

C. by will left the rest of his property, etc., "unto my wife Betsy Court and my son Michael Court, as whole and sole executrix;" and the Court held that the widow and son were both entitled to take probate.

In this case the deceased, Michael Court, left a will containing the following clause:—"I leave the rest of my property, farming utensils, furniture, and all debts owing to me, unto my wife Betsy Court, and my son Michael Court, as whole and sole executrix."

Dr. Spinks now moved the Court to grant probate to the widow and the son. There can be little doubt that it was the intention of the testator that both the widow and the son should have the grant.

SIR C. CRESSWELL: I should guess that he intended it. The difficulty is, whether he has said it. He does not seem to have understood the meaning of the words he was writing. He talks of "provoking all former wills," instead of "revoking."

Dr. Spinks: Omitting the word "executrix," the rest of the will would make them executors according to the tenor. He may have thought executrix was the plural of executor.

SIR C. CRESSWELL: I think he meant the two, and they may take probate conjointly.

1862.

January 16.

RATCLIFFE AND ANOTHER v. BARNES.

RATCLIFFE and ANOTHER *v.* BARNES.

Verdict of Jury.—Caveat.—Probate.—Costs.

A next of kin, though not cited to see proceedings, and not having intervened, if in fact cognisant of a suit between the executor of a will and other next of kin, ending in the establishment of the will, is not at liberty in any way to oppose probate of such will being taken; and where, on a verdict, the Court had pronounced for a will, and a next of kin so situated had entered a caveat, the Court directed probate to issue in spite of the caveat, and condemned the next of kin in costs.

The plaintiffs were the executors of the will of Joseph Barnes; and the defendant, John Barnes, was the son of the said Joseph Barnes. A sister of the defendant had entered a caveat, and the executors had propounded the will. Several pleas had been pleaded in opposition to the will. Issue was joined on those pleas. The issues were tried under an order of this Court before Martin, B., and a jury at the Liverpool assizes, and a verdict was returned in favour of the will. An application for a new trial was made and rejected, and the Court had pronounced for the will.

The plaintiffs then applied for probate, when they were met by a caveat entered by the defendant, a brother of the defendant in the previous suit. The plaintiffs thereupon filed an act on petition, praying that probate might pass notwithstanding the caveat, and that the defendant might be condemned in costs. It was admitted that defendant was cognisant of the former suit, and had assisted his sister in the conduct of it.

Dr. Middleton, for the plaintiffs: According to the practice in the Prerogative Court, when a will was propounded by an executor, all the next of kin who were cognisant of the proceedings were bound by the decree, whether they had been

cited to see the proceeding or not. (*Newell* v. *Weeks*, 2 Phill. 224; *Bell* v. *Armstrong*, 1 Add. 372.)

1862.
January 16.

RATCLIFFE AND ANOTHER v. BARNES.

Dr. Phillimore, Q.C., and *Dr. Spinks* for the defendant: The general rule is, that next of kin are not bound, unless they have been cited to see proceedings; and if that rule is not to prevail, there is no use in citing them. (*Colvin* v. *Fraser*, 1 Hagg. 107.) [SIR C. CRESSWELL: Might not the defendant have intervened in the first suit?] Unquestionably. [SIR C. CRESSWELL: Then he had both knowledge of the suit and the opportunity of making himself a party to it if he pleased, and therefore he cannot have been injured. If he could not have come in without being invited, that would have been a different thing. If he chose to keep out of the suit, and to fight it at the expense of another person, in order to avoid liability to costs, he does not now come very gracefully before the Court. The general principle, as I collect it, is this, that where a party has had full notice, and has had the opportunity of availing himself of the contest, he will be bound by the decision.[1] That was not a mere *dictum*, but the express decision of a very learned Judge (Sir John Nicholl), who had much more experience than I ever shall have in such cases, and I can hardly imagine a case where the rule could ever be applied, if not in this case.] The plaintiffs have chosen to omit taking the ordinary precaution of citing all parties interested to see proceedings, and they have therefore waived their right to object to one of those parties coming in now. By the Probate Act, 20 & 21 Vict. c. 77, ss. 61–3, it is expressly provided that the heir-at-law shall not be bound unless cited, and the same rule ought to apply to the next of kin.

SIR C. CRESSWELL: There is another section (29) which provides that the practice of the Prerogative Court shall be adopted by this Court, except where it shall be altered by that

[1] See *Newell and King* v. *Weeks*, 2 Phill. 224.

1862. January 16.

RATCLIFFE AND ANOTHER v. BARNES.

Act, or by the rules and orders. It would be splitting hairs to attempt to distinguish this case from the case decided by Sir J. Nicholl. Probate must issue notwithstanding the caveat, and the defendant must be condemned in costs.

July 8.

In the Goods of WILLIAM BENBOW.

(*Before* SIR C. CRESSWELL, *on Motion.*)

In the Goods of WILLIAM BENBOW (deceased).

Will.—Codicil.—Citation of parties interested under.—Practice.

B. died on the 27th of March, 1862, leaving a will dated the 17th of April, 1860, whereof he appointed two executors; there was also a paper purporting to be a codicil dated the 26th of March, 1862. The executors, believing this not to be a true codicil of the deceased, asked for a citation on the legatees interested under it, calling on them to propound and prove it if they thought fit. The Court refused to issue this citation, but suggested that the executors might proceed to prove the will in solemn form, and cite the next of kin and the legatees under the alleged codicil to see the will proved.

The deceased in this case died at Ryde, in the Isle of Wight, on the 27th of March, 1862, leaving a duly executed will of the 17th of April, 1860, whereof Thompson and Hess were executors; also a paper purporting to be a codicil to his will, the said paper bearing date the 26th of March, 1862, and disposing of the bulk of the property in a different manner from the will. The executors under the will did not believe this to be a true codicil of the deceased, and were anxious to prove the will alone, and, to avoid any question arising hereafter, prayed a citation to the legatees under the codicil, calling upon them "to propound and prove the said pretended codicil in solemn form of law, if they or either of them should think it to their interest so to do, or otherwise to show cause why probate of the said will only should not be granted to the executors therein-named."

Dr. Phillimore, Q.C., moved the Court accordingly.

1862.
July 8.

In the Goods of WILLIAM BENBOW.

SIR C. CRESSWELL: For the citation you ask there appears, after careful search, to be no precedent whatever, and it seems strange for the executors to call on any other person to propound testamentary papers. But the executors may proceed to prove the will in solemn form, and cite the next of kin and the asserted legatees under the codicil to see that will proved, which, I suppose, will effect the same object.

In the Goods of WILLIAM HENRY BERNARD (deceased).

April 29 and May 6.

In the Goods of WILLIAM HENRY BERNARD.

Affidavit in Foreign Parts.—Description of Deponent.—Practice.

Where an affidavit sworn before a notary in foreign parts is tendered, it must appear that none of the British authorities authorized by 18 & 19 Vict. c. 42, were resident in such place.

Unless the addition of the person making an affidavit wheresoever is inserted, it cannot be read in the Court of Probate.

Dr. Spinks moved for a grant of administration on presumption of the death of W. Henry Bernard.

SIR C. CRESSWELL: One of your affidavits is insufficient. It is sworn before a notary in America, and it does not appear that there is not a British consul or vice-consul, etc., at the place where it was sworn. There is also a defect in another of the affidavits: the description of the deponent is not given in it. It must be resworn.

Dr. Spinks: I trust your Lordship will not think it necessary that the latter affidavit should be resworn, as it will entail the delay and expense of sending it to America. The 46th rule of the rules for the principal registry in non-con-

1862. April 29 and May 6.

In the Goods of WILLIAM HENRY BERNARD.

tentious business is, "The addition and true place of abode of "every person making an affidavit is to be inserted in it." That rule does not in terms make an affidavit, in which the addition etc. of the deponent is not stated, inadmissible. By the 48th rule, "No affidavit will be admitted, etc., in the jurat of which "there is an interlineation or erasure." The difference in the language of these rules seems to show that the omission of the addition etc. of the deponent is not a fatal defect in the affidavit.

SIR C. CRESSWELL: I will consider the matter.

Cur. adv. vult.

May 6. SIR C. CRESSWELL now said, although it may sometimes seem very hard to require that prescribed forms be adhered to, I think it better to adhere to them. The affidavit must be resworn.

[*Note.*—21 & 22 Vict. c. 95, s. 31, enacts that, "In cases "where it is necessary to obtain affidavits, declarations, or "affirmations, to be used in the Court of Probate, from "persons residing in foreign parts out of her Majesty's "dominions, the same may be sworn, declared, or affirmed "before the persons empowered to administer oaths, under "the Act of 6 Geo. IV. c. 87, or under the Act of 18 & "19 Vict. c. 24; provided that in places where there are no "such persons as are mentioned in the said Acts, such "affidavits, declarations, or affirmations may be made, de-"clared, or affirmed before any foreign local magistrate or "other person having authority to administer an oath."]

1862.
July 19, 20, and 21.

(*Before* SIR C. CRESSWELL *and a Special Jury.*)

DYKE (H. M. PROCURATOR-GENERAL) *v.* WILLIAMS.

In the Goods of MARY EMSLEY, widow (deceased).

In the Goods of MARY EMSLEY.

Allegation of Bastardy.—Claim of relationship.—Burden of Proof.—Admissibility of Evidence.

Where an issue is raised between the Crown alleging the bastardy of, and parties claiming to be related to, a deceased intestate, the burden of proof is on the parties setting up the relationship. In such a case evidence of declarations made by a deceased person, other than the deceased in the cause, is inadmissible, unless the relationship is proved *aliunde;* but evidence of declarations made by the deceased in the cause is admissible.

In this case the Queen's Proctor, on the part of the Crown, alleged, in his declaration, that Mary Emsley, late of Grove Road, Mile End, in the county of Middlesex, deceased, died on the 13th of August, 1860, intestate. That the said Mary Emsley was a bastard, and died a widow, without leaving any lawful issue.

The defendant, Samuel Williams, pleaded:—1. That Mary Emsley, late of Grove Road, Mile End, in the county of Middlesex, deceased, who died on the 13th of August, 1860, a widow and intestate, was not a bastard. 2. That the said defendant is the natural and lawful nephew of the said Mary Emsley, and one of her next of kin. 3. That the said Mary Emsley was the legitimate child of Samuel Williams and Mary his wife. 4. That the said last-mentioned Samuel Williams and the said Mary his wife had issue one other lawful child only, namely, Samuel Williams, who died in the lifetime of the said Mary Emsley, to wit, on the 10th of August, 1830, leaving him surviving, the said Samuel Williams the defendant, Elizabeth Gotz, wife of —— Gotz, Abraham Williams, and Joseph Williams, his natural and lawful and only children, and next of kin.

1862. Dec. 17.

In the Goods of MARY EMSLEY.

Issues joined and taken on these pleas now came on for trial by a special jury.

Mr. K. Macaulay, Q.C., *Mr. Boden*, Q.C., and *Dr. Spinks* for the Crown.

Mr. O'Malley, Q.C., *Dr. Wambey*, and *Mr. Bevir* for the defendants.

Counsel for the defendants opened the case, and called witnesses, and were followed by counsel for the Crown who examined witnesses in support of the declaration of illegitimacy.

On the third day counsel agreed that Williams the defendant had established his case.

The following points as to admissibility of evidence were raised during the trial:—

Samuel Williams, the defendant, deposed:—"My mother "spoke to me about her marriage with my father." Question, "Did she tell you when she was married?"

Objected to by *Mr. Macaulay:* This is not within the exception as to admissibility of evidence of declarations made by deceased persons, in matters of pedigree. Here it is proposed to give a narrative of a fact; but if it were within the exception, it must be first shown that the declaration was made by a member of the family, which is the very point in dispute and intended to be proved by the question itself.

Mr. O'Malley, in support of the question, cited 1 Taylor on Evid. 3rd edit. 528.

SIR C. CRESSWELL: I am of opinion that, this being a step towards establishing a marriage, which marriage must be established before the woman's declarations can be evidence, her declarations to place herself in that position are inadmissible.

Joseph Biggs, a witness on behalf of the Crown, deposed to his knowledge of the deceased, etc., "she did not say much to me about her relations." Question, "What did she say to you about her relations?"

1862.
July 19, 20, and 21.

In the Goods of MARY EMSLEY.

Mr. O'Malley objected, referring to the previous ruling of the Court.

SIR C. CRESSWELL: I said that the relationship between the deceased and the person making the declaration must first be established. Here the declaration tendered was made by the deceased herself. I am of opinion that the question may be put.

Evidence was then received of declarations of the deceased that in talking of her will she several times said, "I have no "one that I care about, and it will all go to the Crown."

CRISPIN *v.* DOGLIONI.

Testamentary Suit.—Issues.—Mode of trial.—20 & 21 *Vict. c.* 77. *s.* 35.

1861.
Dec. 17.

CRISPIN *v.* DOGLIONI.

The Court has the power to direct issues of fact to be tried before itself by a jury, reserving issues of law arising out of the pleadings in the same suit to be tried by itself alone.

This was a testamentary suit. The defendant was one of the surviving residuary legatees under the will of Henry Crispin, deceased. The defendant claimed to oppose the will, and in pursuance of an order of Court, had filed a declaration, setting forth his interest to be admitted so to do. To this the defendant had pleaded.

By the pleadings several issues were raised. One of them

1861. Dec. 17.

CRISPIN v. DOGLIONI.

only was a question of fact, viz., whether the plaintiff was the natural son of Henry Crispin; the others were questions of law.

Mr. Hannen, for the plaintiff, now moved the Court to order that the issues should be tried before the Court.

Dr. Spinks, for the defendant, asked that the issue of fact might be tried before the Court by a special jury, and the issues of law before the Court itself.

SIR C. CRESSWELL, after referring to the 20 & 21 Vict. c. 77, s. 35 :—"It shall be lawful for the Court of Probate to "cause any question of fact arising in any suit or proceeding "under this Act to be tried by a special or common jury before "the Court itself," etc., directed that an issue, "Whether the "plaintiff was the natural son of Henry Crispin" should be tried by a jury before the Court, and the remaining issues by the Court.

1862. March 18.

In the Goods of MATTHEW COTES WYATT (deceased), on Motion.

In the Goods of MATTHEW COTES WYATT.

Will.—Codicil.—Mistaken Reference in Codicil.—Revival of prior Will.—Alterations.—Probate.

A. executed a draft will in April, 1847. In May, 1847, he executed an engrossed will. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847. It was supposed that he really intended it to be a codicil to the will of May, 1847. The draft will contained interlineations and cancellations in the testator's handwriting in ink and pencil. Both wills were in the hand writing of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink, but not as altered in pencil:

1862.
March 18.

In the Goods of MATTHEW COLES WYATT

Probate decreed of the draft will of April, 1847, including the alterations in ink, in so far as they agreed with the will of May, 1847, together with the codicil of 1854, but not those in pencil.

Matthew Cotes Wyatt died on the of 3rd January, 1862, leaving three testamentary instruments: namely, a will dated April 28, 1847, with certain interlineations and cancellations, some in ink and some in pencil; another will, dated May 3, 1847: and a codicil, purporting to be a codicil to the will of April 28, 1847, dated Sept. 1854, and which was executed on the 8th or 9th of September in that year. It appeared that the testator in the year 1847 had requested a friend of his (Mr. John Sheringham), then a retired solicitor, and who died in his lifetime, to prepare him a draft will, which he accordingly did. On the 26th of April, 1847, a copy of this draft will was made at the office of Mr. George Adams, of the Middle Temple Lane, law-stationer, by the direction of the testator, as appeared by an entry in his books by G. Macdonald, who was then in Mr. Adams's employ. This copy the testator duly executed on the 28th of April, 1847, in the presence of two of his clerks, Mr. Thomas Evitt and William James Chambers.

On the 3rd of May, 1847, the will of the 28th of April was engrossed at Mr. Adams's office by the direction of the testator, and the said G. Macdonald, who made the engrossment, stated on affidavit that, to the best of his belief, he copied the engrossment from the will dated the 28th of April, 1847.

Upon a comparison of the engrossment with the former will, it appeared that it corresponded with the former will as altered by the interlineations and cancellations in ink, but not as altered in pencil. It appeared by the affidavit of Mr. Evitt, one of the attesting witnesses to the first will, that from the manner in which it was executed neither of the attesting witnesses could see whether it then contained any interlineations or cancellations.

1862. March 18.

In the Goods of MATTHEW COLES WYATT.

In September, 1854, the testator executed a codicil written by himself, and commencing thus:—"I write this as a codicil "to my last will and testament, made in the year 1847, and "signed on the 28th of April in that year, and witnessed by "Thomas Evitt, of Champion Grove, Camberwell, and "William Chambers, of No. 30, Upper Seymour Street, "Portman Square."

After the death of the testator, the codicil and engrossed will were found in a wooden box, which had generally been in the custody of his bankers, and the draft will of the 28th of April, 1847, was found in a drawer wherein he kept draft leases, deeds, and agreements. The rough draft from which the first will was copied could not be found.

Dr. Tristram moved the Court for probate of the draft will dated the 28th of April, 1847, as altered in ink, but not as altered in pencil, with the codicil, to be granted to H. L. Sharp and W. Ellis, two of the executors named in the will. There might be grounds for suggesting that the testator intended the codicil to be a codicil to the second will: but, assuming that he made a mistake in the reference, it was so precise that he apprehended, after the previous decisions, it would be useless to ask the Court for probate of the second will.

SIR C. CRESSWELL: Certainly, I could not grant probate of the second will. How do you propose to show that you are entitled to ask for probate of the first will as altered in ink?

Dr. Tristram: Macdonald, in whose handwriting both the wills are, says that to the best of his belief he copied the second one from the first one; and, on comparing them, it will be found that the second will agrees with the first as altered in

ink, but not as altered in pencil. The alterations in ink must therefore have been made prior to the 3rd of May, 1847 (the date of the execution of the second will), and so must have been in existence when the codicil was executed in 1854.

1862. March 18.

In the Goods of MATTHEW COLES WYATT.

SIR C. CRESSWELL: I will grant probate of the draft will of April the 28th, 1847, including the alterations in ink, in so far as they agree with the engrossed will of the 3rd of May, 1847, together with the codicil of September 1854.

LEE CLARKSON *v.* MARGARET CLARKSON AND OTHERS, and THOMAS CLARKSON (Heir-at-law) intervening.

May 28 and June 11.

LEE CLARKSON *v.* MARGARET CLARKSON AND OTHERS and THOMAS CLARKSON (Heir-at-law) intervening.

Testamentary Papers.—Destruction without Intention to Revoke.—Probate of Draft.

B. duly executed a will in August, 1857; in July, 1859, he executed another will, purporting to revoke the will of 1857; in a suit respecting the validity of the will of 1859, the Court of Probate pronounced against the validity of such will. The draft of the will of 1857 was then propounded, and it was proved that after the execution of the will of 1859, B. had called for the will of 1857, and after appearing to read it had torn it up, saying, "It is of no use now, I have another." Most of the above facts were admitted on the record, and the Court held that there was no proof of the destruction of the will of 1857 with intention to revoke, so as to satisfy 1 Vict. c. 26, s. 20, decreed probate of the draft thereof, and ordered the costs of all parties to be paid out of the estate.

In this suit the plaintiff, as nephew and one of the next of kin of William Clarkson, deceased, cited Margaret Clarkson, the widow, and others interested as legatees, to propound the draft of the will of the said William Clarkson, bearing date the 28th of August, 1857, if they should think it for their interest so to do, etc.

1862.
May 28 and June 11.

LEE CLARKSON v. MARGARET CLARKSON AND OTHERS, and THOMAS CLARKSON. (Heir-at-law) intervening.

The defendants' declaration alleged, first, that a will of the 28th of August, 1857, of which Margaret Clarkson was an executrix, was duly executed, etc.

2. That on the 4th day of July, 1859, the said testator made and executed a will of that date, now remaining in the registry of this Court, purporting to revoke thereby the said will of the 28th of August, 1857; but the same was not in fact thereby revoked, inasmuch as the said will of the 4th of July, 1859, was, on the 25th of July, 1861, by a decree of this honourable Court, made in a certain cause of *Clarkson* v. *Clarkson and Johnson*, pronounced to be null and void in law.

3. That the said testator a few days after having so in fact executed the said will of the 4th day of July, 1859, verily believing the said will of the 28th of August, 1857, to be revoked thereby, tore the said last-mentioned will, and put it in the fire, and destroyed the same.

4. That the paper-writing marked C. annexed to the affidavit of scripts of Lee Clarkson, made and filed in the said last-mentioned cause of *Clarkson* v. *Clarkson and Johnson*, and now remaining in the registry of the Court, is, with the alterations in black and red ink, the true and original draft of the said will of the said testator made and executed on the 28th of August 1857, and that the said will of the 28th of August, 1857, so as aforesaid in fact destroyed, was a transcript from the said true and original draft as altered in black and red ink.

The plaintiff's plea admitted the truth of the first and second paragraphs of the declaration; joined issue on the third paragraph; and as to the fourth paragraph of the declation, without admitting or denying the averments therein contained, submitted the same to the judgment of the Court.

Thomas Clarkson, the heir-at-law intervening, filed several pleas, and the plaintiff and intervener gave notice that they intended only to cross-examine the witnesses produced by defendants.

1862.
May 28 and June 11.

LEE CLARKSON v. MARGARET CLARKSON AND OTHERS, and THOMAS CLARKSON (Heir-at-law) intervening.

The case now came on for hearing before Sir C. Cresswell.

Dr. Deane, Q.C., (*Dr. Tristram* with him) for the plaintiff and intervener.

Dr. Phillimore, Q.C., for the defendant.

The evidence given at the hearing is sufficiently stated in the judgment. *Cur. adv. vult.*

June 11.

SIR C. CRESSWELL, after referring to the pleadings as above stated, proceeded to say:—This case came on for trial before the Court, without a jury, on Wednesday, May the 28th, when it was proved by Mr. Smith, the solicitor who prepared the will of the 28th of August, 1857, and his clerk who copied it for execution, that it was copied exactly from the draft propounded.

The only other witness examined was Margaret Clarkson, widow of deceased, who gave the following evidence:—"I remember the will in question being brought down a few days after the will of 1859 was signed. He asked me to go upstairs and fetch it down (it had been in the custody of witness). I fetched it down, and gave it to him. He said, 'Read it.' I said, 'No; put on your glasses, and read it yourself.' He put them on, and looked as if he were reading it. He said, 'It is of no use keeping this now I have another.' He tore it in pieces, and put it in the fire. After he had burnt it, he said no more to me about it." Being cross-examined, she said,—"He made the last will in consequence of a quarrel with Lee Clarkson; after that, he said many times, that Lee Clarkson should have nothing from him. I was always anxious that he should leave his own relations something. He answered, 'I never will; they never worked for it.'" The affidavit of scripts, made in the former cause, was admitted by Dr. Deane, and put in evidence by the defendants.

The course taken by the parties in pleading, and by their

1862.
May 28 and June 11.

LEE CLARKSON v. MARGARET CLARKSON AND OTHERS, and THOMAS CLARKSON (Heir-at-law) intervening

counsel as to the production of evidence, has left the Court in a somewhat singular position with regard to the question to be decided. It is admitted on the record that the testator signed a will in July, 1859, and that it purported to revoke the will of the 28th of August, 1857. The ground on which the Court held the last will to be void is not stated, nor was any evidence as to the execution of that will laid before the Court. No evidence was given as to the destruction of the will of 1857 by the testator, save that of the widow, who at the same time put into the mouth of the testator a reason for destroying it. I know not how I can accept one part of that evidence and reject the other.

If I reject the whole, there is no proof that the will of 1857 was destroyed by the testator; if I adopt the whole, it was destroyed by him, not for the purpose of revoking it, but because he supposed it had been already revoked.

According to the statute 1 Vict. c. 26, s. 20, a will may be revoked by the burning, tearing, or otherwise destroying the same by the testator, with the intention of revoking the same. The act done without the intention is ineffectual. Here the intention was wanting, for, according to the evidence, he imagined that the revocation had been already accomplished; and because it had been accomplished, and not for the purpose of accomplishing it, the act of destruction was done. For this reason I pronounce for the draft propounded; but under the very peculiar circumstances of the case, I think that the costs of all parties should be paid out of the estate.

1861.

THOMAS *v.* CROWTHER (by JOSEPH HOWE, her Guardian). Nov. 5 and 19.

THOMAS *v.* CROWTHER.

Will.—Issues directed to be tried in a County Court.—Jurisdiction of a County Court as to Costs.—Motion for Attachment.—Personal Service of Orders.—Practice.

Where the issues raised in a suit for proving a will in solemn form have been directed to be tried by the Judge of a County Court, and are found by him against the will, upon a certified copy of his decree being filed in the Principal Registry, the Judge of the Court of Probate will pronounce against the will, and decide any questions as to costs.

Where an order has been made for payment of costs, the Court will not grant an attachment for non-payment of them without an affidavit of personal service of the original order on the party to be attached.

In this case a paper-writing, purporting to be the last will and testament of William Crowther, late of Halifax, in the county of York, who died on the 30th of September, 1846, had been proved in the Exchequer Court of York, in 1850, by the deceased's widow Betty Carter, as the relict and usufructuary legatee for life, the executors having renounced. Betty Carter having died, leaving part of the deceased's personal property unadministered, a caveat was entered on behalf of the defendant Hannah Crowther, spinster, against issuing a grant in respect of the effects of the deceased, which was warned by the plaintiff, and an appearance was thereupon entered on behalf of the defendant, as the lawful grandchild and one of the persons entitled in distribution to the personal estate of the deceased. The defendant being a minor, the Judge on summons directed this appearance to the caveat to be amended, for the purpose of an appearance being entered for the defendant by Joseph Howe, her guardian duly elected, which was accordingly done. The alleged will of the deceased was propounded in a declaration by Mary Thomas, who was a daughter and one of the parties entitled to the residue, and her husband

1861. Nov. 5 and 19. THOMAS v. CROWTHER.

William Thomas, who was one of the attesting witnesses to it. To this declaration the defendant filed pleas denying (1) that the paper-writing propounded was the will of the deceased, and (2) denying its due execution. Upon these pleas issue was joined. The Judge directed the questions of fact raised upon these pleadings to be tried before the Judge of the County Court at Halifax, in the county of York, and for that purpose ordered the record and other documents filed in the cause to be transmitted to the Judge of the said County Court. The case was tried by the Judge of the County Court, who pronounced against the will on both issues. A certified copy of the decree of the Judge of the County Court had been filed in the Principal Registry.

November 5. *Dr. Tristram*, on these facts, moved the Court to pronounce against the alleged will, and to condemn the plaintiff and her husband in the costs of the suit. Application had been made to the Judge of the County Court to condemn the plaintiff in costs. This he declined to do, on the ground that his jurisdiction was limited by section 54 of the Probate Act, to the issues transmitted to him to try, and that any application on the question of costs should therefore be made to the Court of Probate. As the plaintiff had set up a will which was, by the finding on the first issue, a forged instrument, her husband, who was joined with her in the suit, and was one of the attesting witnesses to it, must have been cognizant of the fraud, and ought therefore to be condemned in the costs.

SIR C. CRESSWELL: Before making any order as to costs, I will refer to the Judge of the County Court who tried the case. *Cur. adv. vult.*

November 19. SIR C. CRESSWELL: I have communicated with the Judge of the County Court at Halifax on this case. He has no doubt that the will was a forgery, and that the plaintiff and her hus-

band knew it was a forgery. I pronounce against the will, and condemn them in the costs.

1861.
Nov. 5 and 19.

THOMAS
v.
CROWTHER.

The defendant's costs were taxed by one of the registrars of the Court of Probate at £39. 17*s.* 3*d.*, and the Judge made an order upon the plaintiff Mary Thomas to pay these costs to the defendant's proctor, within seven days after the date of the order.

Dr. Tristram moved for an attachment for non-payment of these costs against William Thomas (as husband of the plaintiff), on affidavits of non-payment of the costs, and of a personal demand on Mary Thomas and her husband William Thomas, for the payment of the above costs on or before the 25th of March, and a personal service of notice that in the event of the costs not being paid on or before that day, the Court would be moved for an attachment against William Thomas, the husband of the plaintiff, for such non-payment.

SIR C. CRESSWELL: It does not appear that the original order for the non-payment of these costs has been personally served on the plaintiff and her husband. Until this is done I cannot grant an attachment.

The original order was afterwards personally served upon the plaintiff Mary Thomas and her husband William Thomas, by showing it to them, and leaving with each of them a copy.

Dr. Tristram renewed the motion for an attachment against the husband.

SIR C. CRESSWELL: The husband is not included in the terms of the order. The order is for the plaintiff Mary Thomas to pay the costs. There is no order for payment of them on William Thomas, the husband, against whom you ask an attachment.

1861.
Nov. 5 and 19.

THOMAS
v.
CROWTHER.

Dr. Tristram: The suit is entitled *Thomas* v. *Crowther*, as it was commenced by Mary Thomas alone, but the husband afterwards became a party to it, as the declaration was filed in the joint names of his wife and himself. He thereby must be taken to have sanctioned and to have made himself liable for his wife's acts, in attempting to establish the will.

SIR C. CRESSWELL: Has he had notice of this motion?

Dr. Tristram: Notice has been given to the plaintiffs' Proctor, who filed the declaration.

SIR C. CRESSWELL: You may take the attachment.

1862.
February 19.

WHITE
v.
WHITE AND
CATO.

(*Before* SIR C. CRESSWELL *and a Special Jury.*)

WHITE *v.* WHITE AND CATO.

Pleading.—Plea of undue Influence.—Plea of Fraud.—Practice.

Where it is intended to invalidate a will on the ground of fraud, or of circumstances tantamount to a charge of fraud, there should be a plea on the record alleging that the execution of the will has been obtained by fraud. A plea of undue influence is insufficient to let in a charge of fraud against the party propounding the will.

Frances Ann White, the plaintiff, and widow of the deceased, propounded the will of Edward White, as the sole executrix named therein. The defendants, who were the daughters and the only children of the deceased, filed two pleas thereto:—1st, That the deceased, at the time of the execution of the will, was not of sound mind; and 2nd, That the will was procured from the deceased by the undue influence of the plaintiff, or of other persons acting in her and under her directions.

1862.
February 19.

WHITE
v.
WHITE AND CATO.

Serjeant Shee, Dr. Phillimore, Q.C., and *Dr. Tristram*, for the plaintiff.

Mr. Macaulay, Q.C., *Dr. Swabey*, and *Mr. Barrow*, for the defendants.

The plaintiff's witnesses having been examined,—

Mr. Macaulay, in opening the case of the defendants to the jury, stated that the deceased, at the date of the will, was a very old man, with a failing memory and a mind subject to fits of irritation. The plaintiff, as he should contend, in order to induce the deceased to exclude the defendants from participating in his testamentary bounty, instilled into his mind false and delusive notions respecting their conduct towards him. The title-deeds to a portion of the deceased's property had been some time before the date of the will required by the defendants to enable them to carry out an arrangement, which they had undertaken, for the purpose of relieving the deceased from certain charges upon his property. For this purpose these deeds were handed over to the defendants by the plaintiff herself, in the presence and with the knowledge of the deceased. The circumstances under which they had been handed over were, at the time when he executed this will, doubtless forgotten by the deceased, and he then charged the defendants with having stolen his title-deed from him. This false and delusive notion was instilled into or fostered in his mind by the plaintiff. Again, shortly before his death he had been served with a writ, as he imagined, at the instigation of the defendants. The plaintiff had instilled into his mind the delusive notion that when he was served with this writ, he had been arrested. His mind was in such an enfeebled and irritable state as to make him incapable of resisting these delusive notions, when pressed upon him by his wife, and it was under this species of undue influence that the will had been executed.

1862. February 19.

WHITE v. WHITE AND CATO.

SIR C. CRESSWELL: It occurred to me, during the course of your cross-examination, that you intended to make a case of fraud against the plaintiff. There is a plea of incapacity, and a plea of undue influence on the record, but there is no plea of fraud. If you intend to charge the plaintiff with having obtained the execution of this will by instilling into the mind of the deceased false and delusive notions respecting the conduct of the defendants, this is tantamount to a charge of fraud, and you should have placed on the record a plea charging her with having obtained it by fraud.[1] I am always unwilling to allow justice to be defeated by technical objections, and I will therefore, if you ask me, give you leave to amend the record by adding a plea of fraud; but the amendment must be made subject to an adjournment, if desired by the plaintiff, and to the defendants paying the costs of the day.

Mr. Macaulay, Q.C., said, if such was the opinion of the Court, he should withdraw the charge of fraud rather than put his clients to the expense and inconvenience of an adjournment.

1860. March 21. and April 4.

IN THE GOODS OF CHARLES WILLLIAM PECK (deceased).

Administration.—Presumption of Death.—Immediate Grant. —Sec. 73 of Probate Act.

IN THE GOODS OF CHARLES WM. PECK (deceased).

A., a bachelor, who had gone to Australia, had not been heard of for seven years. His father died intestate about two years and five months before the expiration of the seven years. No personal representation had been taken out to the father. It being uncertain whether the deceased died before or after his father, the Court granted administration of his effects to his sister as one of his next of kin, under the 73rd section of the Probate Act.

[1] See Boyse *v.* Rossborough, 6 House of Lords Cases, 2.

1860.
March 21 and April 4.

In the Goods of CHARLES WM. PECK (deceased).

Charles William Peck left England in 1849, for California; from thence he went to the Sandwich Islands, and subsequently to Australia. From each of these places he communicated by letter with his father. The last letter received from him by his father was dated "Port Adelaide, South Australia, Sept. 15, 1852." Since the receipt of this letter his family had received no tidings whatever of him. Letters had been written to him by his father and sister, addressed to Port Adelaide, which had been returned to them indorsed "unclaimed advertised letters;" inquiries had also been made for him in Australia without result.

The deceased's father died on the 4th of April, 1857, intestate, and the deceased himself was believed to have died unmarried.

March 21.

Dr. Swabey moved for a grant of administration to the personal effects of the deceased, to be made to Isabella Frances Peck, as his sister and one of his next of kin, and to permit her to make oath that he had died in or since 1852.

SIR C. CRESSWELL: Has any representation been taken out to the father?

Dr. Swabey: I am instructed that none has been taken out.

SIR C. CRESSWELL: The presumption is that Charles W. Peck was dead at the end of the seven years from the time when he was last heard of. But the difficulty you have to contend with is, that there is no legal presumption as to the date of his death. He may have died at any time within the seven years, and his father may have survived him; and if his father survived him, his representatives would be entitled to the grant. If there is any personal representative of the father, and his consent to the grant is obtained, the difficulty will be removed. There should be an affidavit as to whether

1860. March 21 and April 4.

In the Goods of CHARLES WM. PECK (deceased). April 4.

there is or is not any personal representative of the father: if there is, notice of this application should be given to him; if there is not, the only way of getting out of the difficulty will be by making the grant under the 73rd section of the Probate Act.

Dr. Swabey renewed the motion, upon an affidavit that no personal representation had been taken out to the father of the deceased, and that the deceased himself had died intestate.

SIR C. CRESSWELL: As there is no means of deciding whether the deceased died before or after his father, I think it is a case in which I may cut the knot by having recourse to the 73rd section of the Probate Act. I will make the grant under that section.

1861. December 17.

In the Goods of WILLIAM GEORGE SMITH (deceased).

In the Goods of WILLIAM GEORGE SMITH (deceased).

Administration.—Presumption of Death.—Grant of Administration to Mother of Deceased under the 73rd section of the Probate Act.

When the father of the deceased had deserted his wife twelve years ago and gone to Australia, and had not been heard of for seven years, the Court refused to presume that he had died at any given period within the seven years. But, under the circumstances, granted administration of the effects of his son, who had died within the seven years, to the mother, under the 73rd section of the Probate Act, without requiring her first to take out administration to the father.

William George Smith, a master mariner, died on the 7th of August, 1858, at Hongkong, a bachelor and intestate. He had been absent from England since 1852, the year in which he obtained his majority. By the will of his uncle

1861. December 17.

In the Goods of WILLIAM GEORGE SMITH (deceased).

Joseph Sladen, who died in August, 1855, he was entitled to a legacy of £100, which, in consequence of his prolonged absence from this country, had never been received by him. William George Smith left his natural and lawful mother, Katherine Smith, and one sister, Katherine Anna Smith, him surviving, the only persons supposed to be interested in his personal estate. His father, William Sladen Smith, left England in 1849 for Australia. From the time of his arrival in Australia up to the year 1854, he kept up an occasional communication by letter with his wife in this country. She received her last letter from him on or about the 14th of October, 1854, which was in the following terms:—

"Sanunda, July 9th, 1854.

"Dear Katherine,—It is now July 9th, and I have received "no letter or intimation from Captain Thomas, of Port "Adelaide, of any parcel or otherwise. I forbear to express "*any more* my feelings on my sad and heartbroken state. "I have been *very very* ill, and have been staying a week "with a friend of one of my digging companions, a German, "from Holstein, but return to the north to-morrow; am "afraid I shall be obliged to leave, as, from continued ex- "citement of mind, and being in a state of deep melancholy, "I feel getting worse—I cannot get rid of dysentery. If "I do, I shall go at once to the diggings again and join my "friends, that is to say, if I am able; if not, I shall *leave* "*for home*, so that, my movements being uncertain, do not "write to me after the receipt of this, as I may pass the "letter at sea. I have made up my mind, should I reach "England in safety, not to *know*, see, or have any communi- "cation or connection whatever with any one whom I formerly "knew. No, nor will it be for long, should I be spared, that "I will breathe the atmosphere of that polluted city, where "dwell those who foully and cruelly and cowardly slandered "me behind my back. I have nothing more to say, finding

1861. December 17.

In the Goods of WILLIAM GEORGE SMITH (deceased).

"it useless to repeat my wishes. I am still your affectionate "husband,

"W. S. SMITH."

"P.S.—From the Hill River Close, I sent letters during "the months of February, March, April, and May. I wrote "to you, Lewis, and Atkin, all to the care of Lethbridge and "Mackrell, not knowing your address. I posted a newspaper "yesterday, dated July 1st, and shall post another next "Saturday; but when you receive this letter, write no more, "as most likely I shall be on my way home."

Since the receipt of this letter she had never heard from nor been able to obtain any information concerning him. She had written in 1860 to a Mr. Joseph Martyn, a solicitor, practising at Geelong, in the colony of Victoria, who was an intimate friend of her husband, and received from him a statutory declaration to the effect that he last saw him in 1852; that he was then leading a dissipated and vagrant life; that he had heard nothing of him since, although he had made numerous inquiries for him.

Dr. Tristram moved the Court "to decree letters of adminis-"tration to the effects of William George Smith, to be granted "to Mrs. Katherine Smith, his natural and lawful mother and "next of kin." The only difficulty was in passing over the father, who was entitled to the property and grant, if he was living on the 7th of August, 1858, when the deceased died. It was now upwards of seven years since he had been heard of. The statement in his last letter, that he was suffering from dysentery; that he felt he was getting worse; that if he did not get better he should leave for England—coupled with the fact that no further tidings had been received from him,—was evidence sufficient to lead to the presumption that he had died before his son. (*In the Goods of Elizabeth How*, 1 Swab. & Trist. 53). But if the evidence was insufficient for this

1861.
December 17.

In the Goods of WILLIAM GEORGE SMITH (deceased).

purpose, the grant might be made to the mother under the 73rd section of the Probate Act. (*In the Goods of Charles William Peck, deceased*: *see ante*, 506.)

SIR C. CRESSWELL: The evidence, I think, is not sufficient to entitle me to presume that the husband died before the son. From some curious expressions used by him in the letter, it is possible that he may have had reasons for not writing again to his wife. You may, however, take the grant under the 73rd section of the Probate Act.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

1861.
June 7.

WOODGATE
v.
TAYLOR.

WOODGATE (Committee of Taylor) *v.* TAYLOR.

Judicial Separation.—Suit by the Committee of a Lunatic.

The committee of a lunatic may maintain a suit for judicial separation on the ground of the adultery of the wife of a lunatic.

This was a petition by Francis Woodgate, the committee of the person and estate of Skinner Taylor, a person of unsound mind, on behalf of the said Skinner Taylor, praying for a judicial separation on the ground of the adultery of Ann Jenner Taylor, the wife of the said Skinner Taylor.

The petition alleged a marriage on the 10th of July, 1847, and cohabitation; that by an inquisition taken on the 12th of May, 1854, and which inquisition was duly enrolled of record, the said Skinner Taylor was found to be a person of unsound mind, so that he was not sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels. That the said inquisition had never been traversed, and that the said Skinner Taylor continued to be and still was a person of unsound mind. That by an order of the Lords Justices, dated the 27th of May, 1859, the petitioner was appointed and had become and continued and still was, sole committee

of the person and estate of the said Skinner Taylor. The petition then alleged that the respondent had, in 1857, 1858, and 1859, committed adultery with H. Knapman; and that by an order of the Lords Justices, dated the 2nd of March, 1860, it was ordered that the petitioner should be at liberty to take steps to obtain a decree of judicial separation between the said Skinner Taylor and Ann Jenner Taylor.

1861. June 7. WOODGATE v. TAYLOR.

The respondent in her answer denied the adultery.

The issue raised was tried before the Judge Ordinary by a jury. The jury found that the respondent had been guilty of adultery, and the Judge Ordinary pronounced a decree of judicial separation.

June 8.

Mr. Hawkins, Q.C., and *Mr. Archibald* for the petitioner.

Dr. Phillimore, Q.C., and *Mr. D. D. Keane* for the respondent.

HITCHCOCK *v.* HITCHCOCK.

June 12. HITCHCOCK v. HITCHCOCK.

Practice.—Dismissing Petition after verdict of jury.—Rule 45.

When a verdict has been found for the respondent, the Court will not dismiss the petition until the month allowed by the rules for moving for a new trial has elapsed.

This was a suit by a wife for dissolution of marriage on the ground of adultery and cruelty.

The respondent denied these charges, and the issues so raised were tried before the Judge Ordinary, by a jury, on the 23rd of May, 1861, when the jury found both issues in favour of the respondent.

Dr. Spinks, on behalf of the respondent, now moved that the petition should be dismissed.

1861.
June 12.

HITCHCOCK v. HITCHCOCK.

Dr. Swabey contrà: The application is premature, for the petitioner may, under the 45th rule, move for a new trial at any time within a month from the day on which the cause was tried. Until that period has elapsed, the petition ought not to be dismissed.

THE JUDGE ORDINARY: I think, if the petition were dismissed, that a new trial could not afterwards be granted, and therefore, until the time allowed by the rule for moving for a new trial has elapsed, the petition ought not to be dismissed.

Motion rejected.

July 25.

HEPWORTH v. HEPWORTH.

HEPWORTH v. HEPWORTH.

Practice.—Postponing Trial.—Notice of Motion.

The Court will not postpone the trial of a cause on the application of one of the parties, if no notice of the motion has been given to the other party.

This was a suit by a wife for dissolution of marriage. Issue had been joined, and the case had been set down for trial by a jury.

Dr. Wambey, on behalf of the petitioner, now asked that the cause might be placed at the bottom of the list.

THE JUDGE ORDINARY: Notice of the motion has not been given to the husband; I must therefore reject it. I cannot postpone the trial of the cause on an *ex parte* application.

Motion rejected.

1861.
July 25.

HILL v. HILL AND WOOD.

HILL v. HILL AND WOOD.

Practice.—Dismissing Petition after Verdict.—Rule 45.

A motion to dismiss a petition after a verdict for the respondent should be supported by an affidavit that no application for a new trial has been lodged in the registry.

This was a suit for dissolution of marriage by reason of the wife's adultery.

The respondent and co-respondent filed answers denying the adultery.

The issues raised were, on the 17th and 18th of June, 1861, tried before the Judge Ordinary by a jury, who found them against the petitioner.

Mr. Hannen, on behalf of the respondent, now moved the Court to dismiss the petition.

THE JUDGE ORDINARY: An affidavit has not been filed that no application for a new trial has been lodged in the registry. Without such an affidavit I cannot dismiss the petition.

November 12.

SHAW v. SHAW.

SHAW v. SHAW.

Wife's Petition on ground of cruelty.—Husband's Answer.—Justification for his using force.—Pleading.

Where, in answer to the wife's petition on the ground of cruelty, the husband alleges such conduct on the part of the wife as justified him in the use of force, the answer should state generally the nature of the wife's conduct, but need not go into dates or other particulars.

This was the wife's petition for a judicial separation, on the ground of cruelty. The husband filed an answer, the second paragraph of which was as follows:—"Respondent further

1861. November 12. SHAW v. SHAW.

"saith that if at any time he had used any force whatever "towards the said Jane Sabina Shaw (the petitioner), such "force was rendered necessary by the conduct of the said Jane "Sabina Shaw herself."

Mr. H. Bullar now moved for an order that the answer should be reformed, by stating the nature and description of the wife's conduct referred to in the second paragraph, with dates and other particulars. As it stands, the answer simply amounts to a plea, "I was justified in what I did." That is not sufficient.

Dr. Spinks contrà: The respondent is not bound to furnish dates and other particulars. The conduct referred to in the second paragraph is conduct at the time when he is charged to have been guilty of cruelty. No evidence can be given by the respondent of the wife's conduct on any other occasion. As to the nature of the wife's conduct, habits of provocation and exaggeration may be pleaded generally in answer to a charge of cruelty. (*Wallscourt* v. *Wallscourt*, 5 Notes of Cases, 121.)

THE JUDGE ORDINARY: The respondent is not bound to give the dates and other particulars. He can give evidence of the wife's conduct on such occasions only as the wife proves violence to have been used by him, and she must know what she is going to prove. She has therefore ample notice of the occasions on which she will be called upon to explain her own conduct.

As to the nature and description of the petitioner's conduct, I think that she will suffer no inconvenience from a general statement in the answer, that the husband was justified in what he did by her conduct on those occasions, provided he alleges generally, without going into particulars, what her conduct was. But he should allege such conduct or

matters as, if proved, would justify violence. At present it is impossible to say what is the nature of the conduct to which he refers. It may be conduct, *e. g.* drunkenness or insolence, that would afford no justification for his using force, and such as, if pleaded for that purpose, would make the plea bad on the face of it; or it may be conduct that would afford him a justification. The answer must be reformed to that extent, but not beyond.

SHAW *v.* SHAW.

December 17.

Intimidation of Witnesses.—Contempt of Court.

The use of threatening language to a person who is likely to be a witness in a suit, with intention of preventing that person from coming forward to give evidence, is a contempt of Court.

This was another application made by the wife in the above case.

Mr. H. Bullar, on behalf of the petitioner, moved for a rule calling on the respondent to show cause why he should not be committed to prison, or otherwise dealt with according to law, for contempt of Court, in intimidating Maria Dowman, and sending an offensive letter to Mrs. Stewart, for the purpose of preventing them from giving evidence as witnesses in the cause, and why the respondent, at the time of showing cause, should not attend the Court in person.

From the affidavit of Maria Dowman, it appeared that she had been in the service of Mr. Shaw from August till December, 1860; that she had witnessed many acts of cruelty on the part of Mr. Shaw towards Mrs. Shaw, and given full details thereof to Mrs. Shaw's proctors, and had been informed by them that she would be called to give evidence on behalf of Mrs. Shaw at the hearing. That on November 26, 1861, Mr.

1861. December 17.

SHAW v. SHAW.

Shaw called at her master's residence, and insisted upon seeing her; that he said, "What have you got to say about me?" and that she replied, "I have nothing to say to you." That he afterwards said, "Do you know that you have been unlaw- "fully assisting Mrs. Shaw to take things out of my house "clandestinely, and to get her away? I shall summons you. "And what business had you to interfere in Mrs. Shaw's af- "fairs?" That she then said that she thought Mrs. Shaw was an injured woman, and that she had seen him strike her on many occasions; upon which the respondent said, "You are "a liar, and a base liar, and I can prove it; and I will prose- "cute you, and bring fifty witnesses to prove that you are "perjured." That on his leaving he said, "Very well, your "evidence is very good if there is no other tale to be told; "but I have plenty of witnesses against that. That's what I "want to know. I shall give you six months for perjury." That during the whole of the interview, the respondent was violent and bullying in his manner; that his conduct was so violent that the deponent expected every moment he would use personal violence towards her.

It also appeared that the respondent had written to Mrs. Stewart an abusive and insulting letter; that Maria Dowman and Mrs. Stewart were material and necessary witnesses to prove the petitioner's case, and would be called at the hearing.

The respondent filed an affidavit stating that he had been advised by the person who attended to the suit on his behalf, that he ought to procure the evidence of all the servants who had lived with him whilst he lived with his wife; that in pursuance with this advice he had called upon Maria Dowman; that in the course of the interview she stated that he had struck his wife on December the 8th, 1860; that he told her he had not done so, and other witnesses denied that he had; that she persisted in her statements, whereupon, knowing the charge to be untrue, he felt angry and excited. He in substance admitted that he had made use of the language attri-

buted to him, but denied that he had used with the intention of intimidating Maria Dowman, or of attempting to influence her as to the evidence she should give; that he did not write the letter to Mrs. Stewart with a view to intimidate her, or to prevent her from giving evidence, but in answer to some observations Mrs. Stewart had on a previous occasion made to him in the course of a conversation he had with her.

Mr. H. Bullar in support of the motion: The general principle is to be found in 4 Steph. Black, 292, 4th edit.; *Lechmere Charlton's* case, 2 Myl. and Cr. 316; *Littler* v. *Thompson*, 2 Beav. 129. The respondent's conduct is clearly a contempt of Court.

Dr. Deane, Q.C. (*Dr. Spinks* with him) showed cause in the first instance.—Mr. Shaw's conduct may have been very unwise and very undignified, but the question is, whether it is a contempt of Court? In the cases cited the persons dealt with were either the Judge himself or persons concerned and known to be concerned as witnesses already in Court.

BY THE COURT: What difference is there in principle between those cases and the present, if what he said was said with the intention of intimidating witnesses about to depose? There can be no doubt the respondent, in a violent passion, threatened a person who knew some of the facts of the case, that, if she gave evidence, she should be indicted for perjury.

Dr. Deane: His conduct is hardly open to that construction.

BY THE COURT: He says, "That is a lie, and if you swear "it I will give you six months for perjury." What other construction can you put upon it?

Dr. Deane: He denies that he intended to intimidate. As

1861. December 17. SHAW v. SHAW.

to the letter to Mrs. Stewart, the respondent, when he wrote it, could not have known that she would be a witness, therefore there is no contempt of Court. If the Court thinks that his conduct is a contempt of Court, the ends of justice will be met by refusing to make the order, and leaving Mr. Shaw to pay the costs. He acted under the influence of excitement, and without premeditation.

Mr. Bullar in reply.

THE JUDGE ORDINARY: There can be no doubt that the respondent went to Maria Dowman with the intention of intimidating her from giving evidence at the hearing, and that by his conduct towards her he has been guilty of a contempt of Court. I hope that what I have said will be a warning to him to abstain from writing to, or having any communication with the petitioner's witnesses for the future, and that the ends of justice will be answered by my discharging this rule, on payment of costs by Mr. Shaw.

November 19. CLARK v. CLARK AND BOUCK.

CLARK v. CLARK AND BOUCK.

Dissolution of Marriage.—Damages.—20 & 21 *Vict. c.* 86, *s.* 33.

C. obtained a decree *nisi* for dissolution of marriage and damages assessed at £250. On motion to make the decree *nisi* absolute and to direct application of damages, the Court directed all the petitioner's interest in the damages to be assigned by him to a trustee for the use of the only child of the marriage, and in case of the child's death under twenty-one and unmarried, for the use of the petitioner, and suspended the decree till such assignment should be made.

In this case the husband petitioned for dissolution of marriage, and prayed damages against the co-respondent.

1861.
November 19.

CLARK
v.
CLARK
AND BOUCH.

On the 15th of June, 1861, a decree *nisi* was pronounced upon the verdict of a jury, who assessed the damages at £250.

Mr. C. H. Hopwood now moved the Court to make the decree absolute, and also, under the 33rd section of 20 & 21 Vict. c. 85, to direct in what manner the damages should be applied. There was issue of the marriage, one child.

THE JUDGE ORDINARY: The damages must be assigned to a trustee on behalf of the child. If the child die under the age of twenty-one and unmarried, they will go to the petitioner, and the decree absolute will be suspended until the assignment has been executed.

Mr. Hopwood stated there was no prospect of the damages being paid.

THE JUDGE ORDINARY: The petitioner must assign all his interest in them.

In the order the assignment of damages was directed to be settled by one of the conveyancing counsel of the Court of Chancery.

DICKENS *v.* DICKENS.

1862.
January 24.

DICKENS
v.
DICKENS.

Alimony and Costs.—Attachment.—20 & 21 *Vict. c.* 85. *s.* 52.

Where a party is in custody under an attachment for non-payment of costs, etc., and it is desired to charge a second attachment upon him, the Court, in accordance with the practice of the Court of Chancery, will, upon motion, direct a writ of *habeas corpus* to issue to the person having custody of the party; and on the appearance of such party, he will be charged under the second attachment.

This was originally the wife's petition, on which she had

1862. January 24. DICKENS v. DICKENS.

obtained a decree for judicial separation and for permanent alimony, and the husband had been committed to the custody of the keeper of the Queen's Prison, under an attachment for the non-payment of the arrears of such alimony. Upon motion on a previous day an order was made for a further attachment for the petitioner's taxed costs, and for further arrears of alimony; and a writ of *habeas corpus* had issued to bring up the respondent for the purpose of charging him with the second attachment.

Mr. Aspland now stated that the party was present, and he moved in pursuance of the practice of the Court of Chancery, as prescribed to this Court by the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, s. 52, that he might now be charged under the second attachment.

THE JUDGE ORDINARY ordered accordingly.

July 1 and 8. ALEXANDER GRANT v. HARRIET SOPHIA GRANT AND BOWLES AND PATTISON.

ALEXANDER GRANT v. HARRIET SOPHIA GRANT AND BOWLES AND PATTISON.

Petition for Dissolution.—Decree nisi.—Death of Petitioner. —Abatement of Suit.—Post-Nuptial Settlement.

G. obtained a decree *nisi* for dissolution against his wife, and died before it could be made absolute. The petition prayed the Court to deal with a post-nuptial marriage settlement; and the guardian of the minor children of the petitioner prayed to be allowed to intervene for the purpose of making the decree *nisi* absolute, and of obtaining an order of the Court in respect of the settlement.

The Court held that the suit had abated by the death of the petitioner, and that no other party had any right to move in the matter.

This was originally the husband's petition for dissolution of his marriage by reason of the wife's adultery; the petition also prayed the Court to deal with the provisions of a post-nuptial

1862.
July 1 and 8.

ALEXANDER GRANT v. HARRIET SOPHIA GRANT AND BOWLES AND PATTISON.

settlement. No appearance was entered by the respondent. The petition was heard, and a decree *nisi* made on the 31st of January, 1862; on the 19th of March, before the decree *nisi* could be made absolute, the petitioner died at his then residence in the Island of Jersey, having by his will, dated February, 1862, appointed H. E. A. Young and another executors; Young alone proved the will of the petitioner, and had also, in accordance with the local law of Jersey, been appointed guardian to his three infant children. The post-nuptial settlement was in favour of the respondent during her life, and afterwards of the children.

Dr. Phillimore, Q.C., now moved the Court to allow the children by their guardian to intervene to get the decree *nisi* made absolute and to obtain an order to vary the provisions of the post-nuptial settlement. By 22 & 23 Vict. c. 61, s. 5, "the "Court, after a final decree of nullity of marriage, or dissolu- "tion of marriage, may inquire into the existence of ante- "nuptial or post-nuptial settlements made on the parties "whose marriage is the subject of the decree, and may make "such orders with reference to the application of the whole "or a portion of the property, settled either for the benefit of "the children of the marriage or of their respective parents, "as to the Court shall seem fit." This statute is earlier than the one which introduced the decree *nisi* and the decree absolute. Under the section quoted, it is submitted that, on the decree being made, a third party with distinct interests, viz. the children of the marriage, is introduced, without whom the Court has held that it has no power under the section to deal with the settlement for the benefit of either of the parties to the marriage. Are these interests affected by 23 & 24 Vict. c. 144, which directs that the decree shall be a decree *nisi* for not less than three months?

Dr. Deane, Q.C., *contrà*: The suit abated by the death of

1862. July 1 and 8.

ALEXANDER GRANT v. HARRIET SOPHIA GRANT AND BOWLES AND PATTISON.

the petitioner, and the Court has no power to do what is asked.

THE JUDGE ORDINARY: I think the suit abated by the death of the petitioner. I think the children have no claim at all under the section referred to, unless the father makes the claim for them. However, as it is a matter of importance, I will take time to consider. *Cur. adv. vult.*

July 8.

THE JUDGE ORDINARY, after stating the facts and referring to the sections cited, said:—I am of opinion that the authority to deal with the settlement does not arise till after the final decree; *i.e.* as the law now stands, till after the decree *nisi* is made absolute. The suit abated by the death of the husband; there is an end of the matter, and I can do nothing more. *Motion rejected.*

1861. November 19.

LATOUR v. LATOUR AND WESTON (the Queen's Proctor intervening).

LATOUR v. LATOUR AND WESTON (the Queen's Proctor intervening).

Decree Nisi for Dissolution.—Intervention of Queen's Proctor.—Adultery of Petitioner.—20 & 21 *Vict. c.* 85, *s.* 31.

Where, on the intervention of the Queen's Proctor, after a decree *nisi* on the ground of the wife's adultery, it was proved that the petitioner, subsequent to his wife's adultery and a sentence of divorce *à mensâ et thoro*, obtained by reason of such adultery, had himself been adulterously cohabiting with a woman, the Court rescinded the decree *nisi*, dismissed the petition, and condemned the petitioner in the costs of the Queen Proctor's intervention.

The petitioner, General Latour, prayed for a dissolution of

1861.
November 19.

LATOUR v. LATOUR AND WESTON (the Queen's Proctor intervening).

his marriage with the respondent on the ground of her adultery with George Miles Weston.

The respondent appeared, but did not answer; and the co-respondent did not appear. The parties were married in 1826, in 1832 they went to live at Boulogne, and the petitioner was there imprisoned for debt. In November, 1833, his wife eloped with Mr. Weston, and afterwards lived in adultery with him at various places. In 1834 the petitioner brought an action against Mr. Weston, in the Court of Common Pleas, and obtained a verdict with £1500 damages. In 1838 he obtained a decree of divorce *à mensâ et thoro* in the Ecclesiastical Court, on the ground of his wife's adultery. The present petition was filed in April, 1859, and the leave of the Court to prove it by affidavit was obtained. The cause was heard on the 18th of April, 1861, and the Judge Ordinary pronounced a decree *nisi* for the dissolution of the marriage.

On the 6th of June, 1861, her Majesty's Proctor, by leave of the Court, intervened and pleaded, first, that the said petitioner had been acting in collusion with the respondent for the purpose of obtaining a divorce contrary to the justice of the case; secondly, that divers material facts respecting the conduct of the petitioner and the respondent had not been brought before the Court; thirdly, that at the time when the petitioner presented his petition he was, and had been for about twenty-five years prior thereto, cohabiting with a female other than the respondent, and habitually committing adultery with her at divers places, and particularly at the Queen's Bench Prison, in the county of Surrey; at a house situate on Bromley-common, in the county of Kent, and also at a house situate No. 5, Homesdale-place, Bromley, in the county of Kent, where the said petitioner and the said female are still cohabiting as man and wife.

The Court afterwards made an order that particulars should be furnished by her Majesty's Proctor of the material facts referred to in the second paragraph of this plea; and on the

1861. November 19.

LATOUR v. LATOUR AND WESTON (the Queen's Proctor intervening).

31st of July, 1861, her Majesty's Proctor filed a statement that the material facts were those which were more particularly set forth in the third paragraph. Affidavits were afterwards filed in support of the allegation in the third paragraph. No affidavits were filed by the petitioner. The case came on for hearing before the Judge Ordinary.

The *Attorney-General* (Sir W. Atherton) and *Dr. Spinks*, on behalf of the Queen's Proctor, moved for a decree reversing the decree *nisi* of the 18th of April, dismissing the petition for a dissolution, and condemning the petitioner in the costs of the intervention. The affidavits filed by the Queen's Proctor conclusively established the facts alleged by him.

The JUDGE ORDINARY called upon the counsel for the petitioner.

Dr. Phillimore, Q.C., (*Mr. Thompson Chitty* and *Mr. Holt* with him,) for the petitioner: I cannot deny that the charge of adultery against the petitioner is established; the question is, whether the Court should exercise its discretion by dismissing the petition? The petitioner's wife eloped as long ago as November 1833, and the petitioner immediately took the preliminary steps to obtain a divorce *à vinculo* from the Legislature, by bringing an action of crim. con. against the adulterer, and by obtaining a divorce *à mensâ et thoro* from the Ecclesiastical Court. He was not able to proceed with his private Act of Parliament for want of money; his attorney having absconded with the £1500 damages obtained from Mr. Weston. When this Court was established he took proceedings, and produced the clearest evidence of his wife's adultery, and satisfied the Court as to the reasons for the delay in the proceedings. It now appears that after his wife's adultery, he formed an acquaintance with another woman, and he has lived with her as his wife up to the present time.

1861.
November 19.

LATOUR
v.
LATOUR AND WESTON
(the Queen's Proctor intervening).

In construing the discretionary clause in the Divorce Act, 20 & 21 Vict. c. 85, s. 31, the state of the law previous to the passing of that Act should be taken into consideration. The old law was that, however bad might have been the wife's conduct, if the husband had ever on any single occasion been led astray by his passions, he could not obtain a remedy for his wife's misconduct. The Legislature has given this Court a discretion in order to relax the strictness of the old law. If ever that discretion ought to be exercised in favour of the husband, it is in a case like this, where his conduct has not been abandoned and profligate, but he has formed a connection with a woman after obtaining a divorce *à mensâ et thoro*, and has lived faithfully with that woman up to the present time, and has had issue by her. His misconduct therefore cannot have conduced to that of his wife. It will be a great hardship to refuse the relief he prays, and the interests of society will in no way be injured by granting it.

The *Attorney-General* in reply: It would be very dangerous to lay down the rule, that the petitioner's adultery is no bar to his obtaining a divorce. The fact of adultery continuing for many years and going on at the present time is not controverted. With regard to costs, the petitioner's adultery is no doubt a material fact, and ought to have been brought before the Court. As it was suppressed by the petitioner, he ought to pay the costs incurred by the Queen's Proctor in bringing it before the Court.

The JUDGE ORDINARY asked whether there was a statement in the affidavits that the petitioner had no means of proceeding in the House of Lords?

The *Attorney-General*: There is no such statement.

Dr. Phillimore said it was to be inferred from the facts, that

1861. November 9.

LATOUR v. LATOUR AND WESTON (the Queen's Proctor intervening).

his attorney had absconded with the £1500 damages, and that he had for many years been in prison for debt.

THE JUDGE ORDINARY: That falls very far short of showing that he could not have proceeded with a Bill in Parliament, if he had retrenched his expenses.

I am now called upon to deal with this case at the instance of the Queen's Proctor, and Dr. Phillimore has asked me to put a construction on the 31st section of the statute, and to say by what rule I am to be guided in the exercise of the discretionary power given me by that section. The only rule that I can give is, that I will form a judgment, according to the best of my ability, of the circumstances of each case that is brought before me, endeavouring, as far as I can, to act upon the principles which have been recognised in the Ecclesiastical Court, and which have guided that Court in former times, when it decided questions of this sort.

General Latour has asked for a divorce on the ground that his wife has been living many years in adultery, and it appears that he himself has been living in adultery during the greater part of the same period. I cannot believe that either General Latour, or any legal adviser whom he consulted, could by possibility have entertained an opinion that that was not a most material matter for the Court to consider in dealing with his case. General Latour proved the case of adultery against his wife, and the Court was left totally in the dark as to the other fact. It had no means of ascertaining from the evidence brought before it, whether he was to be deemed a person for whose benefit this Act was passed. I cannot entertain a moment's doubt that he is not. I presume the Legislature introduced the clause giving a discretionary power to the Court in order to meet the case of some temporary lapse from purity of conduct on the part of a married man, which might have happened years before, and might have been, as Dr. Lush-

1861.
November 19.

LATOUR
v.
LATOUR AND WESTON
(the Queen's Proctor intervening).

ington expressed it, comparatively venial; but where a man for years and years chooses to take the remedy in his own hands, and says, "I cannot live with my own wife, therefore "I will live with a woman who is not my wife; I was con- "tented to live in that way for twenty years before this "Act of Parliament was passed, and I ask you now to give "me an opportunity of marrying that woman;"—I am not casuist enough to consider this as any great palliation of his conduct.

I cannot say, sitting in this seat, that a man is licensed to live in adultery with another woman, because his wife has deserted him. He was not entitled to do so before this statute was passed; but he continues to do so to this day, notwithstanding the statute. I think that I should put a most strange construction upon this Act, and show that I was unfit to be trusted with the discretionary power that the Legislature has vested in me, if I did not hold that there is in this case a sufficient ground for refusal of the divorce.

Then comes the question as to costs. I cannot help supposing from his affidavit that General Latour has never received payment of the damages, although he did not choose to take upon himself to state that he never had the means of proceeding in the House of Lords for a divorce. I am quite satisfied that both he and his advisers must have known that the matter now introduced into the case was most material matter to lay before the Court. He chose to abstain from laying it before the Court, and he must therefore pay the expenses incurred by the Queen's Proctor in doing that which ought to have been done before.

The decree *nisi* will be reversed, the petition dismissed, and General Latour condemned in the costs of the Queen's Proctor.

1862.
Jan. 21.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor intervening).

Petition for Dissolution.—Intervention and Pleas of Queen's Proctor.—Connivance.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor intervening).

No blindness and weakness on the part of the husband, short of an actual willing consent beforehand to the wife's adultery, will constitute connivance, so as to bar his title to a dissolution of marriage by reason of the wife's adultery.

QUÆRE, whether, in conducting a suit on behalf of the Queen's Proctor intervening, the Attorney-General can claim any privilege as in Crown Cases.

This petition came before the Court on the intervention of the Queen's Proctor. The petition alleged a marriage in 1850, and cohabitation at Sheffield, Manchester, Sleaford, and Nottingham; that on the 17th of July, 1860, the respondent left the petitioner's house in Nottingham in company with Burke, and adulterously cohabited with him during the rest of that year, and subsequently thereto. To this petition the respondent appeared, but did not answer; the co-respondent did not appear. On the 15th of May, 1861, the Judge Ordinary directed the petition to be proved by oral evidence before the Court. On the 16th of November, the Court gave leave to the Queen's Proctor to intervene, and directed that the trial of the cause should be stayed till further order. To the petition the Queen's Proctor pleaded—first, that the petitioner was acting in collusion with the respondent to obtain a divorce contrary to the justice of the case; secondly, that Annie Marris did not commit adultery with William Burke; thirdly, that if adultery was committed, the petitioner was accessary to, consenting to, and conniving at, such adultery; and prayed to dismiss the petition and condemn petitioner in the costs of the Queen's Proctor's intervention. The petitioner took issue on these pleas, and on the 21st of January the Court ordered, on the motion of the intervener, that the petitioner should be in attendance at the hearing. The case now came on for hearing on these pleadings.

1862.
Jan. 21.

MARRIS
v.
MARRIS AND BURKE
(the Queen's Proctor intervening).

Mr. W. Cooper conducted the petitioner's case.

The adulterous cohabitation of the respondent and co-respondent at Liverpool and Manchester in the early part of 1861 was proved, and the handwriting of petitioner and respondent and co-respondent in certain letters.

The following letters in Burke's handwriting were read:—

"Thursday, July 5th, 1860.

"I have only just got yours forwarded from ——, only just "time to catch the post; been hard at work all day; be sure "and write by return. I will send a long letter; cannot say "when I shall be nearer. Sunday could go anywhere to meet "you. Should like to be at Harrogate. God bless you, is "the constant prayer of your William.

"Friday and Saturday—Talbot Hotel, Bradford.

"Sunday, unless I hear from you to meet somewhere, Bee- "croft's Hotel, Leeds. I am going to have a hot bath to-night. "I shall finish work about four or five o'clock on Saturday."

(Addressed) "Mrs. B. Williams, Post Office,
"Nottingham."

"Talbot Inn, Bradford, July 6th.

"I will be at Beecroft's Hotel, Leeds, on Sunday, and back "again here on Tuesday. I will go to Skipton on Monday, and "be sure and write if you cannot come. The Leeds house is a "nice quiet place. I have just finished my day's work. Don't "know when I shall get as far as Nottingham; every place "seems to me the same now—desolate, very desolate; yet I "keep up my spirits well. I will be in Leeds to-morrow night "as well as Sunday.

"Your WILLIAM.

"Be sure and write by return."

(Addressed) "Mrs. B. Williams, Post Office,
"Nottingham."

1862.
Jan. 21.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor inter-

"White Swan Hotel, Halifax, July 11th, 1860.

"Yours to Bradford reached me just as I was starting for "here this morning. I sent you a small note on Monday "morning, as I was obliged to leave and had to work two "towns on that day (Skipton and Keightley). I have been "very busy all day, and just finished (half-past eight o'clock), "by selling all my crinoline bonnet patterns to one man. Be "sure and write to me. I will be at the George, Hudders-"field, until Friday morning; will wind-up the week by "coming to Nottingham on Saturday. I could hardly credit "my senses when I read your note this morning. I had "courage enough to open it—the subject which contained all "my hopes and fears. I trust all will be amicably arranged. "My thoughts upon the subject you are already in possession "of, and I will never swerve. But Saturday and Sunday we "can devote to the arrangements of our future. God bless "you!—I am hurried for the post.

"Yours as ever, WILLIAM.

"I will write by the next post."

(Addressed) "Mrs. Marris, 6, Clyde Villas,
"Welford Road, Nottingham."

The *Attorney-General* (*Dr. Spinks* with him), for the Queen's Proctor, stated that his intervention was founded on information that Marris had not only consented to his wife leaving his house and going to Burke, but had desired that she should do so, and had made arrangements therefor. Beyond certain letters, the handwriting of which was already proved, he should rely on the examination of the petitioner, if the Court thought fit to have him examined.

A letter was then read, dated "Tuesday, ten o'clock.—I went "to Warsen Gate yesterday. Felt disappointed there was no "note or message for me; just had your whereabouts. The "important question is finally settled, and the article is wait-

"ing your claim. I have not felt so happy for years as now. "Come, or write to me what you wish me to do; better tele- "graph." So far was in Mrs. Marris's handwriting. On the opposite side of the paper was the following, in Mr. Marris's handwriting:—"It will be better to attend to this matter first "thing." The envelope was addressed in Mr. Marris's hand- writing, "Mr. W. Burke, of Nottingham, Talbot Hotel, Brad- ford, Yorkshire," and bore postmarks of Nottingham, July 10, 1860; of Bradford, Yorkshire, July 11, 1860.

The other letters referred to were as follows, from Mrs. Marris to her husband:—

"July 18th, 1860, Wednesday morning.

"Your very feeling note just received, but in mercy do not "make my child try to hate me, if you do, you will be as great a "sinner as I am. If I could have thought that you was deceiv- "ing me in this of all circumstances of my life, I should not "have been in the position I am at this time. You said you "advised me as the dearest of brothers; you was the first I "have ever had, and I shall never wish for another. There is "nothing in the house I wish for; make the best home you "can for my poor cats: I cannot even forget them in this my "day of trouble. I feel my child will be taken care of, and "she is a sacred trust. The I O U which Mr. Holroyd holds "of yours has been destroyed, and as a parting gift to the dear "one I brought into this world, I give it to her, also a Bible, "which I know you will teach her to use more than her "mother has done. I am going to Hull to night. A letter "to the Post Office will find me. Direct Mrs. Annie. And "now farewell, and I pray that your future life will be as "happy as I have made your past wretched. I am as miserable "as I deserve to be; I cannot close my eyes or see a child "but my own one is before me. Oh be merciful, and let me "see her. What is all this world to me without her? and if I "never prayed before, I have done so this last three days. If

1862. Jan. 21.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor intervening).

"you had said, 'Annie, which will you give up?' I should not "have hesitated one moment. How could a mother part with "her child that she has suckled and watched over all through "her life? and God above knows how well I loved her. The "hours of trouble I have had when she has been ill or away "from me! You know it has been almost idolatry. The "roses you gave me I have got, and will keep as the last "memento of the garden where you and I and the dear "one has passed many happy hours. The dear little straw- "berry bed which I gave you looked so nice yesterday. "One thing I have to ask you: send me one of the peas "her dear little hand planted, and when I die it shall be "buried with me; and if I am never to see her again, may "this be my last day in this world. Do not send that let- "ter to Emma. It is impossible for me to be his wife for "the next six months; he would make me that this moment "if the law would allow him. Before you advised me as you "did, you should have ascertained the position I should be "placed in. If you will let my darling come, will you take her "to Fily for two or three weeks, and I give you my word "she shall not see, no more will I, the one that has been "the cause of all. Will you send my hat?"

(Addressed) "Mr. Marris,
"Midland Dining Rooms."

"Sunday morning, October 14th, 1860.

"Oh, William, my husband, father of my child, forgive "your unhappy Annie, or I shall be lost in this world and "the one to come. I have dreamed the last two nights that "you had taken me to your heart again. How happy I felt "then it would be impossible to tell, and how wretched to find "it only a dream! William, my husband, I was faithful to "you many long years—would to God I had kept so! I "passed the churchyard yesterday where our dear first-born "laid. I prayed to God to watch over his dear sister and

1862.
Jan. 21.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor intervening).

"their father, and forgive their unhappy mother for the great "sin she has done. William, forgive me, or I die. God grant "that this, my last prayer, may reach your heart. I have "wrote my first letter to my child, hoping she will get it on "her birthday. To be parted from her on that day more than "all others, it seems to me now more than I shall be able to "bear. William, let your birthday gift to her be her mother's "forgiveness. If I live, I will prove worthy the gift you give "her. You know how much I love her. What a dear little "tender plant when first brought into this world! How we "watched, day and night, over our little precious one! This is "Sunday—just such an one when we stood together by her "bed, with our hearts too full to speak, watching the dear "little sufferer, and you lulled her to sleep by dropping cold "water on her hand.

"Oct. 21.—I had wrote this far when I was taken ill. "Thank God I am better; but how cruel whoever copied "that letter for my child to write to me. It was the first I "had ever wrote to her, and may God forgive them, for I "never can. I am guilty, I know; no one can condemn me "more than I do myself; but do you not think you are "equally guilty, when you prayed on your knees for your "wife to go and live a life of wickedness, for that it was, "and that you did."

(Addressed) "Mr. Marris, Walcot Fen, near Timberland, Sleaford."

"Sunday, April 7, 1861.

"I was very much surprised in receiving a copy of a de- "claration made by you in the Divorce Court, and much "more so at the plea you there set forth. Now, I appeal "to your own sense of honour whether I have or have not "acted strictly as you requested me. I will leave it to the "Court to decide whether, after you went down on your "knees and begged and prayed for me to leave you, and

1862. Jan. 21.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor intervening).

"promising so faithfully to get all done quietly, and that "publicity would be avoided by your getting a divorce on "the ground of incompatibility or mutual consent. All this "you urged upon me, at the same time expressing your fervent "wish and desire that I should leave you, and that both you "and I would be much happier apart. You also accompanied "me to the train and took my ticket, that I might go to make "what arrangement I could for the future. This and other "evidence can I bring forward to prove that you have been a "party to everything in connection with our separation. I "cannot and will not consent to a divorce on the ground which "you have rested your plea; any other ground you please; "and I have letters that will prove in any Court what part you "have taken in the affair, and also that I have acted strictly "in accordance with your wishes and as you desired me; and "my leaving you was only brought about by your constant and "repeated solicitations that I should do so for both our sakes, "and after your repeated promise to be unto me as a brother; "and in your letter to me you even addressed me as your dear "sister. What view the Court will take remains to be seen, "my leaving you at your own request—indeed, repeated re-"quests. The view I think they will take will be that it has been "a deep-laid plot on your part to get rid of me. Consider well "before you proceed further in the case, whether if even you "should succeed, which is doubtful, would it be well to drag "the name of your child's mother before the public in such a "manner. For your love to her, be merciful and spare her "unhappy mother, and do not try to crush me more than you "have already done. You took my child, home, name, friends, "and I had not one single penny in my pocket when I left you. "God above knows how much I have suffered. I did not ex-"pect you to persecute me any more. On my knees I ask you "now not to proceed any further in the matter, but let me re-"main in seclusion and quietness. I am trying to be useful "and hope to gain, by my own industry, a little resting-place;

"but if you carry out what you have begun, you will find one "for me, and that is, my grave. I will not interfere with you "in any way. Let my child write to me. Surely this cannot "be asking too much. William, if you had committed sins, "however deep, I would not have kept your child from seeing "or writing to you. My own dear one, she wrote to me this "morning, and sent me a book-mark, and poor as I am at this "moment, not all the wealth in this world could buy them "from me. I will wait until Tuesday night to hear from you. "I am still at Birmingham, so you had better send to me there. "I cannot write any more now, but I have a volume on my "mind and my heart is full. ANNIE.

(Addressed) "Mr. W. Marris, Messrs. Bovias, Green, "and Graham, St. Paul's Churchyard, London.

"April 7, 1861."

The petitioner was then examined by the Attorney-General, and gave the following evidence:—"It was not so much as a "week after the 10th of July that my wife went to Doncaster; "I accompanied her to the station at Nottingham, took her "ticket, and paid her fare. She returned the following night. "On that occasion she did, to my knowledge, intend to "meet Burke at Doncaster, with her mother, who lived at "Sheffield. I made no arrangements as to where she was to "sleep that night. I did not know at that time that indecent "familiarities had taken place between Burke and my wife."

A memorandum in petitioner's handwriting, signed by Mrs. Marris, in the following words, was here shown him:—"I, "Annie Marris, do hereby agree that I will henceforth give "up all correspondence whatever, either writing or personal "interviews, with Mr. William Burke, or any one of the "family, according to the wish of my lawful husband, and I "vow that I will fully carry out his wishes in these matters.— "Witness my handwriting this 7th day of June, 1860.

"ANNIE MARRIS."

1862. January 21.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor intervening).

"I remember that. I had heard that he had been writing to "her, and that he had been seen at my house when I was "away. I had not at that time seen any letters. I had heard "of their being together elsewhere than at my house during "my absence; that was at Wilford Grove, about two miles "south of Nottingham, walking about there; there is an "avenue of trees. That was probably before the memoran- "dum of the 7th of June. I had heard of their being in "the same bedroom at the Stag and Pheasant at Leicester; "say, in December, 1859. I had a place of business at Leices- "ter; Burke was manager there; and she went once or "twice a week to Leicester to bring home money, and used to "pass the night there. Before she went to Doncaster, I don't "think I communicated with my wife's mother; I only knew "from what my wife said that her mother was to be there. She "lived with me at Nottingham till the Saturday following, six "or seven days after the 11th of July. On my wife's return "from Doncaster, I ascertained from her that she had met "Burke; she told me she had slept in Doncaster, but not where; "don't remember to have asked her where, or where Burke "slept. After memorandum of 7th of June till she left we "had words about Burke." [The *Attorney-General* here referred witness to the letter of 7th of April, 1861.] "I never "expressed a desire that we should live apart; she asked me "whether she should give me up or him; I said, 'If you can't "give him up, you must give me up; if, after living ten years "together comfortably, the thread of affection is so thinly "woven, the sooner it is broken off the better.' At first "she said she could not give him up, then she said she could "not give me up, and would remain with me; this was two "or three days before she left me. I did not say that if she "left me I would arrange a divorce quietly, on the grounds of "incompatibility of temper, or mutual consent. I remember "nothing of the sort. Might or might not have been said; "I can't swear. I told her (after she left, she wrote to me)

"that I could no longer look upon her as a husband, but "that, as a brother, I would advise her the best I could. "I don't remember addressing her as sister." [The witness was referred to the letter of 18th of July, 1860.] "I had not "desired her to leave my house, or advised her to do so. I "had said nothing about advising her as a brother up to that "time; at least, have no recollection of it."

The letter of 14th and 21st of October was here read by the *Attorney-General.*

"I did not tell her to leave, only that she must give up him "or me; at last of all I did not desire her to leave."

The letter of Tuesday, ten o'clock, was then put into witness's hand, and he was asked what he meant when he wrote, "It will be better to attend to the matter first thing." "I "don't know, I have forgotten all about it; that is all I can "say about it." [In answer to questions by the COURT:] "I "don't know whether I read first what my wife had written; "there was only one question then to be settled, that is, of our "parting. I suppose by the 'article is only waiting your claim,' "she meant herself."

Examination continued: "I heard Burke was at Notting-"ham after my wife went to Doncaster; my servant went to "fetch him from Grantham; she told me her mistress sent "her; he came to my private garden; I don't know whether "to my house, I was not at home. She left on the Sunday, "in the morning; from my house she went elsewhere in Not-"tingham. I was sleeping in the town, not at home. I saw "her on the Monday. I slept at home on the Sunday night; "she was not there; don't remember whether I saw Burke on "the Monday; perhaps I did on the Tuesday passing in the "street; I did not speak to him, he and my wife were passing "in a cab. I have seen my wife in London a good deal from "time to time since the suit began."

In answer to questions of *Mr. Cooper*, the petitioner deposed as follows:—"When first married we lived at Sheffield,

1862. January 21.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor intervening).

"a few doors off where Burke's mother and sister lived; "there was visiting and intimacy between the families; this "continued till we went to Nottingham, in September, 1858. "At Christmas, 1858, Burke was out of a situation and came "to us on a visit; nine or ten months after that he was in "my employment. In November, 1859, I opened a branch "shop at Leicester; Burke was sole manager for me there. "I failed in March, 1860. I might have been up to London "after that. Some time in December, 1859, I heard an ill "report of my wife from my brother-in-law, by the General "Post-office in London. On my return to Nottingham the "same night I talked with my wife; I told her that I had "heard that she and Burke had been seen together in a "bedroom. She said it was a mistake, it was his sister "(who was in my employ at that time, and boarded and "lodged at the Stag and Pheasant, at Leicester, as well "as Burke, at that time). Nothing more was said. She "satisfied me by that explanation; we lived on as before. "I first found some letters which aroused my suspicions. "Six or seven months after that, three or four days before "she went, I found three letters in her bosom, and asked "her the meaning of them; she acknowledged it was not "right and asked me to forgive her; she said there was "nothing beyond the letters, that things had gone no further. "The memorandum of the 7th of June was made because I did "not like the family or Burke about the place and had dis-"charged him. My wife was fond of going to see him at "her mother's, who then lived at Nottingham, and from the "losses at Leicester, upwards of £400,—through his neg-"lect, as I considered,—I wished to have the intimacy broken "off entirely. I told her this; she had promised before. "I said I had taken her word and could take it no longer. "I then wrote the memorandum, and she signed it. As to "the visit to Doncaster, she asked leave to go and see her "mother; at first she said she wanted to see Burke. I strictly

"objected; then she wanted to see her mother—had made "arrangements to see her. I said, 'If you are going to see "your mother, I cannot object; if you are going to see "Burke for the purpose of seeing him only, you must not "go; if you do go, you won't have a home to come back to "on your return.' She came home on the Sunday night. "I asked her, had she seen her mother? She said, 'No; she "was from home. I don't think I did anything wrong. We "had two beds at the hotel.' I don't remember what I said, "nothing in particular. She made a full statement on the "Thursday before her leaving. Between the Sunday and "that Thursday I remember no words about the matter. "It was late at night before we went to bed; I took his por-"trait out of her pocket. I was feeling for some letters. I "had found the letters the day previous. I asked her what "it meant. She said, 'That is mine; you have no business "with it,' and tried to get it out of my hand. She said she "loved him a great deal more than me; that she had one "little treasure of his yet, and showed me a ring on her "wedding finger. I asked her where my wedding ring was. "She said, 'At the bottom of the Trent.' She said he gave "her that ring the first time he took liberties with her, on "the 23rd of July, 1859. After that I asked her to go to "bed. She went to bed, and I remained on the sofa. Next "morning I went to see her relations at Sheffield, and asked "them to advise me. They said, 'Never go near her again.' "I returned to Nottingham at 8.30, and found her and Burke "gone to the garden."

Mr. Cooper then recalled Birmingham, a witness examined by him in support of the petition, who now, with respect to the letter of the 7th of April, 1861, deposed: "I recollect "that letter being written at my house at Manchester; it "was partly read out to me by Mrs. Marris, after she wrote "it. The letter was written by Mr. Burke, and copied by

1862. January 21.

MARRIS v. MARRIS AND BURKE (the Queen's Proctor intervening).

" her. I saw both the papers. I don't know what has be- " come of the original."

The Attorney-General expressed a doubt as to the course to be pursued in addressing the Court.

THE JUDGE ORDINARY: Unless you claim the privilege of a Crown case, which is a matter for consideration, you should comment on your own evidence, and I shall hear Mr. Cooper in reply.

The Attorney-General then addressed the Court.

Mr. Cooper was heard in reply.

THE JUDGE ORDINARY: In this case I am of opinion the petitioner has established the charge of adultery against the respondent and co-respondent.

The Queen's Proctor traversed the adultery, and as to that he is defeated. The case, then, depends upon whether there was connivance to bar the petitioner's claim to the usual remedy. That the Queen's Proctor should have been advised to intervene can surprise no one, for evidence more approximating to proof of connivance, without absolutely touching it, can hardly be imagined. The husband was all but criminally weak; to the branch shop at Leicester, which Burke managed, the wife went over once or twice a week to collect the money, and was allowed to pass the night there. At one time he heard a rumour of the respondent and co-respondent having been seen together in a bedroom. An explanation was given by the wife, and it does not appear whether he took any steps to ascertain the truth of it. The result so far is, that he was very weak; but I do not think that he intended his own dishonour. More than once he remonstrated with her. There is no proof of any connivance up to the time when the letter of 10th of

1862.
January 21.

MARRIS
v.
MARRIS AND BURKE
(the Queen's Proctor intervening).

July was written. It must have been known to the petitioner; and if from it I must infer that he was a willing and consenting party to the adultery between his wife and Burke, there is an end to the case. It appears that he had discusssed with her the impropriety of this intimacy; that he found letters in her bosom. The only evidence that throws any light on the expression, "the important question is "settled," is, that the husband had told her she must choose between Burke and himself. The words in his handwriting, "It will be better to attend to this matter first thing," I cannot construe as a willing consent that adultery should be committed; it seems rather an unwilling consent: "she has "made up her mind, and is determined to leave me; so "the sooner she goes the better."

By connivance I understand that the husband so behaves himself as to give a willing consent to the act, though he need not be an accessary before the fact. The letters written by her are important; those written not long after she left express the deepest regret and sorrow, whereas in that written after the suit was instituted she asserts that all was done at his desire, and so on. Birmingham, however, proved that that letter was written by Burke, and copied by her to send to her husband; and the contrast of the letters in tone and expression is striking, the object of the last being, plainly enough, to screen the co-respondent from costs. Comparing the letter of the 10th of July with the evidence in the whole cause, I do not think that the petitioner connived at his wife's guilt. He is therefore entitled to a decree *nisi* for the dissolution of his marriage, and with costs against the co-respondent.

1862.
Feb. 1 and 5.

BURROUGHS v. BURROUGHS.

BURROUGHS v. BURROUGHS.

Wife's Petition for Restitution.—Husband's Answer alleging Adultery. — Right to Begin. — Competent Witnesses. — Practice.

When the wife's petition for restitution of conjugal rights is heard before the Court without a jury, her counsel have a right to begin, though the substantive issue may be raised on the husband's answer. In such a suit the husband is a competent witness in support of his answer alleging the wife's adultery; for the Court on his evidence might refuse the decree of restitution, though it could not make a decree for judicial separation.

There being cross-issues of adultery in the husband's petition for dissolution standing for trial before a jury, the Judge Ordinary suspended his judgment until these issues were disposed of.

This was a suit for restitution of conjugal rights brought by the wife against the husband. The petitioner alleged the marriage, cohabitation to a certain date, and the husband's refusal to cohabit since that date. The answer denied that the husband had at any time without just cause refused to permit the wife to live and cohabit with him, "for "he says that he hath a just and reasonable cause for sepa- "rating himself from her by reason" that she has, on divers occasions, committed adultery. The wife's reply denied the adultery, and the case now came on for hearing before the Judge Ordinary without a jury.

Dr. Phillimore, Q.C., and *Dr. Swabey*, for the petitioner.

Sir Fr. Slade, Q.C., and *Dr. Spinks* for the respondent, after the pleadings opened, claimed to begin, the proof of the substantial issue, viz. the wife's adultery, being on the respondent. *Cherry* v. *Cherry*, 1 Swab. & Trist. 319, seems directly in point.

THE JUDGE ORDINARY: That case was tried before a jury,

and the only issue on the record was cruelty. Here the case comes before me on the whole petition. The petitioner must prove the marriage, etc., in the usual course, and must therefore begin.

Dr. Phillimore then opened the petitioner's case, and the petitioner and other witnesses were then called to prove marriage, etc.

Sir F. Slade opened the respondent's case as to the petitioner's alleged adultery, and called Thomas Proctor Burroughs, the respondent, as a witness.

Dr. Phillimore objected. Upon the wife's suit for restitution is engrafted by the husband's answer and its prayer (which asks for a decree of judicial separation by reason of the wife's adultery, as well as to reject the prayer of the petitioner) a suit by reason of adultery; and in this the husband is not competent as a witness (14 & 15 Vict. c. 99, s. 4). I abstained from asking the wife any question bearing on this issue; my learned friends, of course, had the opportunity of cross-examining her.

THE JUDGE ORDINARY: I observed that you did; but I think I must hear the husband's evidence. I presume it would be competent to answer a petition for restitution by pleading adultery, and merely praying to reject the petition without asking for a decree of judicial separation; then I might refuse the decree for restitution on the husband's evidence, though I could not on such evidence make a decree of judicial separation.

The respondent's evidence, and that of the other witnesses on his behalf, was then taken, and witnesses on the part of petitioner called in reply.

1862.
Feb. 1 and 5.

BURROUGHS v. BURROUGHS.

A petition by the husband for dissolution of his marriage by reason of the wife's adultery (*Burroughs* v. *Burroughs and Silcock*), in which the wife's answer charged adultery against the husband, being on the list of cases to be tried before a jury,—

THE JUDGE ORDINARY, at the end of the present case, said: I shall reserve my judgment till the issues raised in the suit for dissolution are disposed of by the jury, and say nothing which might prejudice that trial.

February 4.

PEARSON v. PEARSON.

PEARSON v. PEARSON (on motion).

Order for Payment of Costs.—No Indorsement of Amount on Writ.—Practice.

On the 8th of May, 1861, an order was made for attachment to issue against the respondent for non-payment of taxed costs, and the respondent was subsequently confined in Chester gaol under the attachment.

Held, that it was too late, in January, 1862, to move to set aside the attachment on the ground that the amount of costs to be paid was not indorsed on the writ, the allocatur and order for payment having been previously served upon the respondent.

This was an application on behalf of the respondent to set aside an attachment for irregularity, and to discharge the respondent from custody under the said attachment.

The suit was originally the wife's petition for dissolution of marriage. On the 6th of February, 1861, an order was made for the taxation of petitioner's costs, which, on the 15th of that month, were taxed at £32. 18*s.* 2*d.* By an order of the 27th of February, the said sum was ordered to be paid by the respondent to Messrs. Routh, Rowden, and Stacey, the petitioner's solicitors, within a week after service.

1862.
February 4.

PEARSON
v.
PEARSON.

On the 8th of May, 1861, an order was made for an attachment to issue against the said respondent for contempt in not paying the costs, and the attachment issued under which the respondent was arrested and placed in Chester Castle.

The attachment was not indorsed with the amount of costs for the non-payment of which it was issued, nor did the amount of costs appear in the body of the writ, which was the irregularity complained of.

Dr. Spinks moved the Court accordingly. — Nothing is brought to the knowledge of the sheriff or the party as to what sum the latter is to pay. By section 52 of Divorce Act, the Court has the same power to enforce its orders as the High Court of Chancery has. In 1 Dan. Ch. Prac. 357, it appears that an ordinary contempt in process may be cleared by doing the act required and payment to the other party of costs incurred by the non-performance, but the rule in Chancery is never to put the seal to the attachment till the amount to be paid is indorsed (2 Dan. Ch. Prac. 811).

Mr. John C. F. S. Day, contrà.—In this case the defect, supposing it to be one, is a mere irregularity. The arrest was on the 15th of May, 1861—it is now too late; and the respondent was not prejudiced, for he must have known the amount. [By the COURT: What is the rule as to its being too late to complain of irregularity when the liberty of the subject is in question?] As to that, *R.* v. *Burgess*, 8 Ad. & Ell. 275, seems to be in point. As to the amount to be paid, he could not have been released by paying the amount indorsed, as he must have paid the costs of attachment as well.

Dr. Spinks: Here the irregularity complained of is of the very essence of the writ. *Cur. adv. vult.*

THE JUDGE ORDINARY: This was an application on be-

1862. February 4.

PEARSON v. PEARSON.

half of the respondent to be discharged from custody in consequence of an irregularity—viz. that the writ of attachment was not indorsed with the amount to be paid. The party, however, had full notice; he was served with the allocatur and order of Court; there was, therefore, no real want of information; if he had desired to pay the sheriff and found any difficulty, he might have applied to the Court; but he is too late now in applying to be discharged on a mere irregularity —for it is a mere irregularity; the attachment itself is good.

Feb. 18 and 25.

Re the Petition of JOHN AUGUSTUS SHIEL BOUVERIE.

Re the Petition of JOHN AUGUSTUS SHIEL BOUVERIE.

Legitimacy Declaration Act, 21 & 22 *Vict. c.* 93.—*Mode of Trial.*

The Court will, generally, at the request of either party to a petition under the above Act, direct issues raised to be tried by a jury.

This was a petition under the Legitimacy Declaration Act. The parties cited to see proceedings pleaded that the petitioner was not the legitimate son of his parents, and that the marriage of his parents was invalid.

Mr. T. Jones, for the petitioner, moved that the issues might be tried before the full Court without a jury.

Mr. Matthews, for the parties cited, moved that the issues might be tried by a special jury.

Mr. Leigh, for the Attorney-General, left the question to the Court.

THE JUDGE ORDINARY: Personally, I am in favour of trial by jury. I have not the least objection that a jury should

take the responsibility of deciding issues of fact, especially where questions of credit are involved.

1862.
Feb. 18 and 25.

Re the Petition of JOHN AUGUSTUS SHIEL BOUVERIE.
Feb. 25.

Cur. adv. vult.

THE JUDGE ORDINARY: I have considered this question, and acting upon the principle I have always acted upon, that where there is no special reason to the contrary, and either party wishes for a jury, a jury should be granted, I shall grant the motion for a jury in this case, as I do not find that there is such a state of circumstances as would lead me to suppose that it is a case which a jury could not properly try. Some cases of this kind involve complicated questions, and the examination of a variety of documents. But where it is a simple question of fact, *e. g.* legitimate or not, access by the husband or not, there is no reason why the parties should not have a jury. If there is a jury at all, either party is entitled to a special jury if he comes in time.

HARDING *v.* HARDING AND LANCE.

February 25.

HARDING
v.
HARDING AND LANCE.

Taxation of Wife's Costs.—Practice.

Costs of application for further time to answer, etc., on behalf of the wife, will, as a general rule, not be taxed against the husband. Nor costs of a motion for the husband to attend and be examined on the wife's petition for alimony, and his answer on oath thereto, where the result of his examination is to establish the truth of his answer on oath.

Dr. Wambey, on behalf of the wife, the respondent, moved for a rule *nisi* to review a taxation of costs in a suit for dissolution by a husband. His first objection was, that the registrar had not allowed the wife the costs of an application for time to answer.

1862. February 25. HARDING v. HARDING AND LANCE.

THE JUDGE ORDINARY: The costs of such an application should certainly be disallowed. It was rendered necessary by her own laches. On questions of this kind I rely on the experience of those who are more skilled than I am in the practice of the Ecclesiastical Courts. It has been reported to me by one of the registrars that the costs of summonses for time are never allowed, unless it can be shown that, owing to some laches on the other side, further time was necessary, and that in the Ecclesiastical Courts the wife's proctor's charges for obtaining further time were never allowed.

Dr. Wambey next objected to the registrar's taxation, that the costs of a motion for the attendance of the husband to be examined upon his answer to the petition for alimony had not been allowed, although the husband had been ordered to attend, and had been examined.

THE JUDGE ORDINARY: You asked me to have the husband examined; and, as I thought his answer a very extraordinary one, I ordered him to attend; but, after hearing his examination, I thought he had made out his case.

Dr. Wambey: It was a complicated answer, tending to lead us to believe that he had property other than he had disclosed in the answer.

THE JUDGE ORDINARY: I cannot grant a rule. The registrars must act upon some principle, and they cannot take into consideration the circumstances of each case. If it is sought to make a case an exception to a general principle, the application ought to be made when the case is before the Court, without the expense and trouble of a motion to review the taxation. If the answer was insufficient, the wife might have been justified in applying for an order that he should file a further and fuller answer; and according to the prin-

ciple adopted in the registry, she might have been entitled to the costs of that application. But here she exercised the power of rather an inquisitorial character, of having the man here and cross-examining him. Having failed to make out her case by the cross-examination, she cannot have the costs. The taxation of the registrar is quite right.

1862. February 25.

HARDING v. HARDING AND LANCE.

Rule refused.

BOULTON *v.* BOULTON AND PAGE (the Queen's Proctor intervening).

March 18.

BOULTON v. BOULTON AND PAGE (the Queen's Proctor intervening).

Decree Nisi.—Intervention of Queen's Proctor.—Pleading.—Mode of Trial.—23 & 24 *Vict. c.* 144, *s.* 7.—*Rules of 22nd November*, 1860.

If the Queen's Proctor intervenes by leave of the Court, pleads to the petition, and the petitioner replies, whereby issues are raised on the record, the Court will not generally allow such issues to be decided by affidavits; but if the Queen's Proctor, under the first branch of sect. 7 of 23 and 24 Vict. c. 144, as one of the public, enters an appearance and shows cause against a decree *nisi* being made absolute, he may proceed to file affidavits under rule 18, and on those and counter-affidavits, if filed, the question raised may be argued under the direction of the JUDGE ORDINARY.

In this case the husband petitioned for a decree of dissolution; no appearance was entered by the respondent or co-respondent; and, on proof of the allegations in the petition, a decree *nisi* was pronounced on the 31st of May, 1861.

On the 12th of November 1861, the Court was moved to make the decree absolute, but the application was not granted; and, by direction of the Judge Ordinary, the papers in the case were sent to her Majesty's Proctor, who thereupon intervened and pleaded. The petitioner replied to the allegations in the Queen's Proctor's plea, and issue was joined on them. The Queen's Proctor then filed affidavits in support of his plea, and the petitioner filed affidavits in answer.

1862. March 18.

BOULTON v. BOULTON AND PAGE, (the Queen's Proctor intervening).

Dr. Spinks (for the Queen's Proctor) moved that the cause might be heard on the affidavits on Tuesday next.

THE JUDGE ORDINARY: But there is an issue joined upon the plea. There has been some misapprehension with regard to the practice in cases where the Queen's Proctor intervenes. There are two courses open to the Queen's Proctor. He can either intervene by leave of the Court and plead, or he can intervene as one of the public, under the first branch of the section, and show cause on affidavit under the 18th rule. Here he has intervened and pleaded under the 16th rule, and filed affidavits to show cause under the 18th rule.

Dr. Spinks stated that the same course has been taken in this as in the previous cases. In *Rogers* v. *Rogers*, where the Queen's Proctor intervened after the decree *nisi*, issue was joined upon his allegations, and the case was tried by affidavits.

THE JUDGE ORDINARY: There must have been some misapprehension on the subject. If the Queen's Proctor intervenes under the latter part of the section, he must then, under the 16th rule, take a part in the pleadings; but if he shows cause as one of the public, he is then "to file affidavits setting forth the facts on which he relies," and "the party in the cause in whose favour the decree *nisi* for a dissolution of marriage has been pronounced may within eight days after delivery of the affidavits, or within such further time as may be allowed by the Court, file affidavits in answer, and shall forthwith give notice of his having done so." Then, by the next rule, "the questions raised on such affidavits shall be argued at such time as the Judge Ordinary may appoint, and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue

tried in this Court." Now that the papers are before me, I cannot shut my eyes to the fact that there is an issue joined on the record. I therefore reject the motion to hear the questions raised argued on the affidavits on Tuesday next.

1862.
March 18.

BOULTON v. BOULTON AND PAGE (the Queen's Proctor intervening).

FORSTER *v.* FORSTER and THOMAS.

February 25 and March 4.

Alimony.—Policy of Insurance.

FORSTER v. FORSTER AND THOMAS.

The general rule in estimating the husband's income for the purposes of alimony is, that he is not entitled to deduct sums paid by way of premium to maintain a policy of insurance on his life; but where the policy was under settlement for the benefit of his wife and children after his death, and the premium was deducted and paid over to the office by his employers, the Court allowed him to deduct the amount of such premium in estimating his income.

This was a question arising on a wife's petition for alimony *pendente lite*, in a suit by a husband for dissolution on the ground of adultery.

The husband, in his answer to the petition for alimony, alleged that in the year 1857 his employers agreed to increase his annual salary, which was then £400, by the sum of £300, upon condition that he would insure his life for a specified sum for the benefit of his wife and children; that he did insure his life for that sum, and that, in pursuance of the agreement with his employers, he had made a settlement of the insurance for the benefit of his wife and children after his death, and his employers had since deducted and continued to deduct £165, the amount of the premium, from his annual salary, and to pay it over to the insurance office.

Mr. *D. D. Keane* for the wife.—The husband is not entitled to deduct the £165 a year. *Harris* v. *Harris*, 1 Hagg. 351, is conclusive that it was the invariable rule of the Eccle-

1862. February 25 and March 4.

FORSTER v. FORSTER AND THOMAS.

siastical Courts not to allow deductions for premiums upon life insurances.

Mr. *R. Searle* for the husband: The general rule laid down in *Harris* v. *Harris* is not applicable to this case. The reasoning there was, that the policy at any time was capable of being converted into money; but this policy is not under the husband's control. He can derive no benefit from it, and he is obliged to pay the premiums.

March 4.

THE JUDGE ORDINARY: The husband is, I think, in this case, entitled to deduct the annual premiums from his income, and I allot alimony subject to such deduction.

March 13.

GRAY v. GRAY (the Queen's Proctor intervening).

(*Before the* JUDGE ORDINARY *and a Common Jury.*)

GRAY *v.* GRAY (the Queen's Proctor intervening).

Decree nisi.—Queen's Proctor's intervention.—Collusion.—Evidence.

On the trial of an issue of collusion, arising on the Queen's Proctor's intervention, in a petition to which the husband had not appeared:

HELD, that the statements made by the husband, not in the presence of the wife, were inadmissible as evidence on the issue before the jury:

HELD, that the petitioner, the wife, could not be called as a witness, either under 14 & 15 Vict. c. 99, or 16 & 17 Vict. c. 83.

QUÆRE: Whether the Court has power to give costs against the Crown on a verdict adverse to the Queen's Proctor being found?

This was originally a petition for dissolution of marriage, at the suit of the wife, by reason of the husband's bigamy and adultery. The respondent never appeared to the petition, which was heard on oral evidence before the Judge Ordinary, on the 17th of January, 1861, when a decree *nisi* for dissolution was made, and the respondent condemned in costs. On the 20th of March the Queen's Proctor obtained leave to inter-

vene, and on the 27th of March filed the following pleas:— 1. That the said petitioner has been acting in collusion with the respondent for the purpose of obtaining a divorce, contrary to the justice of the case. 2. That divers material facts respecting the conduct of the said petitioner and the said respondent have not been brought before the Court. 3. That, at the time when the said petitioner presented her petition for dissolution of her marriage, she was, and had been for some years previously, habitually committing adultery with Francis Kendall, an omnibus proprietor.

The fourth, fifth, sixth, and seventh paragraphs specified places and times of adulterous cohabitation; and concluded with a prayer that the Court will be pleased to refuse to make the said decree *nisi* absolute, and, further, to dismiss the petition of the said Mary Louisa Gray, and to condemn her and the said Richard Thomas Clement Gray, or such of them as it shall see fit, in the costs arising from the Queen's Proctor's intervention.

On the first and second paragraphs the following particulars were delivered by the Queen's Proctor to the petitioner's solicitor.

The following is the nature of the collusion set forth in the Queen's Proctor's plea in the above suit:—That the said Richard Thomas Clement Gray, the respondent, was aware that the petitioner was living in a state of adultery as charged in the Queen's Proctor's plea, and, nevertheless, collusively agreed with the petitioner not to defend the suit, in order that she might obtain a divorce.

And the following is the nature of the material facts referred to in the second paragraph of the Queen's Proctor's plea:—That the petitioner had been for many years, and still was, living in a state of adultery, as charged in the Queen's Proctor's plea; and was, at the time of filing her petition, cohabiting with Thomas Kendall, at 14, Tyssen Terrace, Dalston Lane, Hackney: and, in order to conceal that fact, and to

1862. March 18.

GRAY v. GRAY (the Queen's Proctor intervening).

deceive the Court, caused herself, or allowed herself, to be falsely described in her petition, and the affidavit accompanying the same, as resident at No. 7, Hardinge Street, Wellington Street, Upper Islington.

The petitioner's answer to these pleas denied that she had been acting in collusion with the respondent for the purpose of obtaining a divorce contrary to the justice of the case; admitted that she had committed adultery with Kendall, as charged; denied that any other material facts had been withheld from the Court; alleged that she had no separate property, and submitted that she ought not to be condemned in the costs arising from the intervention of the Queen's Proctor, nor in any part thereof, as prayed by the Queen's Proctor.

The issue of collusion now came for trial before the Judge Ordinary and a common jury.

Dr. Wambey, with him *Mr. M. Chambers*, Q.C., opened the pleadings.

Sir F. Slade, Q.C. (*Dr. Spinks* with him) stated the case on behalf of the Queen's Proctor.—This was originally the wife's petition for dissolution of marriage, by reason of her husband's bigamy. The husband knew that the wife had been living in adultery, but he did not answer the petition, or even appear to the citation. In 1850 Mr. Gray brought an action for crim. con. against Kendall, which was settled. He afterwards married a Miss Addams.

Witnesses were then called on behalf of the Queen's Proctor.

Beesant, clerk to Mr. Eyre, 32, Poultry: Know Richard Thomas Clement Gray. In 1850 he gave me instructions to issue a writ against Kendall for crim. con. On the 9th of December writ issued. After that, Gray told me he had procured the writ to be served.

1862.
March 18.

GRAY
v.
GRAY (the Queen's Proctor intervening).

Mary Ann Addams deposed: I know Gray, the respondent in this petition. Became acquainted at Gravesend in 1852. He said he was a single man, paid me courtship, and we were married in 1853 at the registrar's office at Mile End. About six months after Mrs. Gray called, said Gray was her husband, and that she had had children by him.

BY THE COURT: You have to prove that the parties to this record are acting in concert in respect of this petition. What was said seven years ago to or by Gray does not seem to have much bearing on that.

Evidence continued: I am not now living with Gray; I have left him three years. Whilst living with him I saw Mrs. Gray several times at Wapping and Moulsey; the first time at Prescot Street. Mrs. Gray saw Mr. Gray at his house. She never had any meal with him. She once lunched with me, but not with Gray. I have gone out of the room and left them together. We were at Wapping in 1856 for nine or ten months. Mr. Gray has said something to me about a divorce.

Mr. M. Chambers objected that what Mr. Gray said, not being in the petitioner's presence, could be no evidence against her.

BY THE COURT: So far as affects Gray, what he says would be admissible; but the issue which the jury are trying is not joined with him, but only with Mrs. Gray; and what he has said is not good against her.

Sir F. Slade: It may affect the question of costs.

BY THE COURT: That may be so hereafter; but there is no issue before the jury which makes the evidence admissible now.

1862. March 13.

GRAY v. GRAY (the Queen's Proctor intervening).

Evidence continued: Mrs. Gray once told me she intended to get a divorce; that was just after she found out his marriage with me.

Stephen Nokes deposed: I am a bottle and wine-merchant. I know Gray; I knew him under the name of Addams, at Wapping. Was employed by him in 1855, and till April, 1856, at Nelson Walk, and afterwards in Devonshire Square in September, 1860. In December he closed up. He was a wine and bottled-stout merchant. Know Mrs. Gray, the petitioner. Have seen her at Mr. Gray's, at Wapping, and in Devonshire Square. She drove down in September and December, 1860, with her son. I used to be in the cellar. She may have stayed two hours.

On cross-examination: The boy was about sixteen, and going to sea. She came about his father getting an outfit.

Mrs. Gray, the petitioner, was then called by *Sir F. Slade*, and the admissibility of her evidence objected to by *Mr. M. Chambers:* (16 & 17 Vict. c. 83, s. 3) "No husband shall be compellable to disclose any communication made to him by his wife during marriage, and no wife shall be compellable to disclose any communication made to her by her husband during marriage." This is also a suit instituted by reason of adultery, and petitioner is within the exception of the second section of the Act just cited, and of the exception of the 4th section of 14 & 15 Vict. c. 99.

BY THE COURT: I think that is so. Though the immediate issue before the jury is collusion in the prosecution of the suit, the petition is a proceeding instituted in consequence of adultery, in which the Queen's Proctor has intervened; and the petitioner, whether as a party to the suit, or as the wife of a party to the suit, is within the exceptions of the section referred to.

1862.
March 13.

GRYY
v.
GRAY
(the Queen's Proctor intervening).

Sir F. Slade then said he could carry the case no further on behalf of the Queen's Proctor.

THE JUDGE ORDINARY, to the Jury: You will probably think that there is no evidence before you on which you can find that the petitioner has been acting in collusion with the respondent for the purpose of obtaining a divorce. When the Court was established, it was quite possible that a dissolution of the marriage might be obtained where each party knew the other to be quite as guilty. One came and asked for a divorce, and the other spouse simply took no part in the proceedings. The object of the law, however, was not to give relief to the guilty; and the Amendment Act of 1860 was passed, enabling the Queen's Proctor to intervene and bring matters before the Court, which, before that Act, third parties had no power to do.

Again, there are cases in which the husband and wife may agree together to present a case before the Court in order to obtain the divorce which they both desire, which is the charge brought against the petitioner in the present instance by the Queen's Proctor. She denies, however, any concert or agreement with her husband about the matter; and I apprehend that the Queen's Proctor has failed to produce any evidence which can establish that there was such concert or agreement.

The jury found a verdict for the petitioner on the issue joined.

Mr. M. Chambers asked for costs.

BY THE COURT: No; the whole case was one in which the Queen's Proctor's intervention was most properly exercised. The petitioner, though herself living in adultery, would have obtained a dissolution of the marriage if the Queen's Proctor had not intervened. Secondly, I much doubt whether I have power to give costs against the Crown.

1862.
January 31.

GETHIN v. GETHIN (the Queen's Proctor intervening).

GETHIN v. GETHIN (the Queen's Proctor intervening).

Verdict of Jury.—Motion for New Trial.—Affidavits.—Practice.

On the wife's petition for dissolution of marriage, to which the husband had not answered, the Queen's Proctor intervened, and alleged the adultery of the petitioner and collusion. Issues taken on these points were found in favour of the petitioner by verdict of a jury. On motion for rule *nisi* for a new trial, the Court read affidavits of the Queen's Proctor, and of witnesses who had been called by him at the trial; the affidavits of the latter were in substance that they had told the truth, but not the whole of what they knew, and it was argued that if the whole of what the witnesses knew had been laid before the jury, they would have found a different verdict.

The Court refused, on such affidavits, to make a rule *nisi*.

This was originally a suit by Lady Gethin for a dissolution of her marriage with Sir Richard Gethin. The respondent filed no answer, but while the suit was pending the Queen's Proctor intervened, and alleged that Lady Gethin had been guilty of adultery, and that she and Sir Richard had colluded for the purpose of obtaining a divorce contrary to the justice of the case. These allegations were denied by the petitioner, and the issues were tried before his Lordship and a special jury on the 19th, 20th, and 21st December last. The jury found both issues in favour of the petitioner.

The *Attorney-General* (with whom was *Sir F. Slade*, Q.C.) moved for a rule *nisi* for a new trial on behalf of the Queen's Proctor, upon the grounds, first, that the verdict upon the issue of adultery was against evidence; and secondly, that since the trial some of the witnesses who had been examined in support of the Queen's Proctor's allegations had disclosed some material facts which they had before withheld, and which had not therefore been laid before the jury. On the first point the Attorney-General contended that the conclusion

1862.
January 31.

GETHIN
v.
GETHIN
(the Queen's Proctor intervening).

that the adultery had been committed was an irresistible inference from the admitted facts of the case. Lady Gethin, while she was living apart from her husband, daily visited Mr. Ellis, a widower, at his lodging in the house of the Misses Denny, at Notting Hill, and remained with him for several hours, generally until late at night. Their opportunities of meeting were ample. Their meetings were not accidental, but contrived, and they were upon terms of the greatest familiarity. It was hardly possible that stronger evidence of adultery should ever be given, short of proving that the parties were openly living together as man and wife. He next proceeded to the second ground upon which he applied for the rule, and which he admitted presented some difficulties.

THE JUDGE ORDINARY asked whether there was any authority in the reports of the Common Law Courts for the reception of affidavits under circumstances similar to the present.

The *Attorney-General* referred to the case of *Edgar* v. *Knapp*, 6 Scott's N. R. 707. He next read the affidavit of the Queen's Proctor, to the effect that he had used every means in his power to obtain from the witnesses all the information in their possession; that he had great difficulty in obtaining any evidence at all from the Misses Denny, and that they had refused to make any statement to him until he had served them with a subpœna; that after the Misses Denny had heard the evidence of Mr. Ellis, and of the brother of the petitioner, in support of the petitioner's denial of the allegation of adultery, they made certain statements to his clerk which induced him to go on the day after the trial to their house, and that he there had an interview with them, when they stated to him several material facts which they had before withheld. The Misses Denny also made an affidavit, stating that they had often heard the bed creak when Lady Gethin and Mr. Ellis were in Mr. Ellis's bedroom together,

1862. January 21.

GETHIN v. GETHIN (the Queen's Proctor intervening).

and had found the bed tumbled after they had left the room. They added that they were in ill health, and were very unwilling to be examined as witnesses in such a case, and had deliberately and advisedly avoided going into these indelicate details; that they had answered every question put to them according to the truth, but they had avoided going into matters as to which they not been questioned; and that after the evidence of Mr. Ellis, they remarked to the Queen's Proctor's clerk that his statements were wholly untrue, because they had often heard the bed creak and seen it tumbled. Caroline Wilson, the servant of the Misses Denny, also swore that she often heard the bed creak when Mr. Ellis and Lady Gethin were in the bedroom together, and had seen it tumbled after they came out, but she had not made this statement in the first instance to the Queen's Proctor, because she thought that, as her mistresses had confined themselves to answering the questions put to them, without volunteering any information, she was bound to take the same course. The Attorney-General submitted that these facts ought to have been laid before the jury; and, as the conduct of the witnesses had made it impossible to lay them before the jury at the last trial, there ought to be another trial before a second jury, in order that the whole truth might be elicited and justice done.

THE JUDGE ORDINARY: This is certainly an important application; but, having had notice that it was to be made, I have had an opportunity of examining and considering the affidavits now presented to the Court, and I think the course I ought to take is perfectly plain, and that I must refuse to grant a rule.

This is not a suit between party and party, it is not a question raised between Sir R. and Lady Gethin; but it is a suit instituted by the Queen's Proctor as guardian of the public morals, for the purpose of preventing a misapplication

1862.
January 21.

GETHIN
v.
GETHIN
(the Queen's Proctor intervening).

of the statute constituting this Court. The Queen's Proctor has done his duty, and nothing more than his duty, in bringing this case before the Court. He has to take care that parties do not abuse the privilege given them by that statute. But the charge he has made against the petitioner is a *quasi* criminal one, that of having colluded with the respondent and endeavoured to get a divorce by a false case.

The case is to be looked at in two aspects:—First, with reference to the verdict of the jury. It is not suggested that there was anything erroneous on the part of the Court in presenting the facts of the case to the jury. The rules of law applicable to evidence of adultery were stated by me, not in my own language, but in that of Lord Stowell. In considering the verdict of the jury, I am not bound to say that I should have found the same verdict. I cannot tell what verdict I should have found, for I had not the responsibility cast upon me of dealing with the evidence; but the parties had the benefit of a special jury of gentlemen of education, and there is no reason to suppose that they acted under the influence of prejudice, or of passion, or of mistake. It is not suggested that they believed anything sworn to which they ought not to have believed, or that they wilfully rejected the testimony of any witness without any ground for so doing. It is simply suggested that they did not draw that inference which the Attorney-General thinks they ought to have drawn from the facts before them. No direct evidence of adultery was given, but the jury were asked to infer it from the circumstances proved in evidence. The jury appear by their verdict to have said, "We are not satisfied with the evidence; we are left in such doubt that we feel we cannot safely draw the inference suggested, and therefore we find that the charge is not proved." In substance the verdict cannot be put any higher than that. It is manifest that the opinions of mankind may vary very much as to the circumstances from which the inference of adultery is to be drawn. The opinions of the jury may depend upon

1862. January 21.

GETHIN v. GETHIN (the Queen's Proctor intervening).

the sort of society in which they have lived, whether they were accustomed to associate with people who were strict and careful, or with people who were free and easy, and somewhat careless in their conduct. One set of men may think, that if a married woman indulges in any improper familiarity with a man, she would be likely to commit adultery; whilst another set may think that a great degree of license may exist, and yet that a woman would stop short of committing the great offence. Why should I say that this jury were wrong in the inference they drew, rather than that another jury would have been wrong if they had drawn a harsher inference? Even if I were to say now that I should not have found the same verdict, could I assume that I should have been right, and that the jury were wrong? I therefore think I ought not to say that the verdict was wrong; and, unless I could go as far as that, I ought not to disturb it. Be it remembered that the jury had the positive evidence of Mr. Ellis to get over, and it was not a pleasant thing to say that they believed Mr. Ellis to be perjured. True, if there had been direct evidence on the other side, and it had been necessary for them to say, either that Mr. Ellis, on the one side, or that A. or B. on the other side, were perjured, they could not have avoided taking upon themselves the responsibility; but in the absence of affirmative evidence on the other side, they were justified in saying that they would not disbelieve the positive evidence. I cannot tell by what reasoning the jury arrived at their verdict. They may have said, "The lady has been very imprudent, she has indulged in improper familiarities, but we are not satisfied that she is therefore an adulteress; we should have been very much dissatisfied if any connection of our own had gone so far, but we are not satisfied that she is an adulteress, and, being in doubt, we are bound, according to legal principle, to give her the benefit of the doubt, the person alleging adultery being bound affirmatively to prove it." They may have argued that if, during the long period of time

over which the allegation of adultery extended, these ladies discovered no more than they said they had discovered, no adultery could have taken place. They were vigilant; the servant proved that there was a good deal of listening at doors and prying at keyholes going on, and the jury may have argued that when they had heard their evidence, they had heard the worst that could be said against these persons. For these reasons, taking the case as it stood when it went to the jury, I think I should be assuming far too much if I were to say that the verdict of the jury was wrong.

Then comes the question as to the affidavits. The only case which the Attorney-General has been able to find—and, no doubt, if there had been another case he would have found it —is one which differed very much from the present. It appeared that in that case there was some misapprehension upon the part of counsel as to what could be proved by a gentleman who had not previously been examined by the attorney, and who, when he came out of the witness-box, said, "Oh, I could have proved a great deal more than that if I had been asked." How different is this case! Two ladies—very respectable ladies in their way, for aught I know,—come here to say, "We wilfully abstained from giving evidence; at least, we gave evidence of a part only, not of all we could prove." They do not present themselves in a very favourable aspect when they say that they deceived the gentleman who called them as witnesses, and that they gave their evidence in such a manner that they wilfully deceived the Court and the jury. Is it likely that another jury would be disposed to act upon their evidence under these circumstances?

Again, they were called to prove adultery, and they proved circumstances from which they wished the inference to be drawn that adultery had been committed. Counsel were, or ought to have been instructed that these ladies were unwilling witnesses; that they had at first refused to give their testimony, and that they had at last given it only up to a certain

1862. January 21.

GETHIN v. GETHIN (the Queen's Proctor intervening).

point; and I should imagine that any counsel so instructed would have tested and probed them by further questions as to whether they had observed or heard anything more than they had stated. But not a word of that sort was said. One of the ladies said that she had given Mr. Ellis a hint that he had better go away, because the neighbours had noticed his familiarity with Lady Gethin: not that she had noticed it, not that she was satisfied that an improper intercourse was being maintained between them. If she knew for months that such an intercourse was going on, if she was so convinced of it that she sometimes rang the bell in order to disturb them when she thought they were committing an act of adultery, does it redound very much to her credit that she allowed this man to occupy her lodgings for months and months, and never desired to get rid of him or his paramour, until the neighbours noticed their familiarity? Even supposing I were to send the case down again for trial, the great probability is that a jury would reject the evidence of these ladies, not calmly and deliberately, but somewhat passionately.

As to Caroline Wilson, she also appears now to carry her evidence a great deal further than she did at first. The ladies did not like to mention these indelicate facts, but she had no scruple of that sort. Why should she hesitate to tell about the bed being tumbled? She says, that when she saw the course taken by her former mistresses, she thought she had better take the same course, and she therefore confined herself to giving categorical answers to the questions put to her. There is nothing to warrant me in submitting the parties to the ordeal of another trial under these circumstances.

The Queen's Proctor has only done his duty in presenting this case to the jury, because there was abundance of suspicion to call for inquiry; but I cannot undertake to say that the jury did wrong, and I ought not therefore to disturb the verdict as given contrary to the evidence, or upon these affidavits.

Rule refused.

CARTLIDGE *v.* CARTLIDGE.

Custody of Infant pending Suit.—Right of Father.—20 & 21 *Vict. c.* 85, *s.* 35.

The father has the Common Law right to the custody of an infant, however young; and, in the case of an infant of seven months, the Court held that the mother must show more than the mere natural desire of a mother, to induce the Court to exercise its discretion under the Divorce Act in her favour, and, as it did not appear that either mother or child were suffering by the separation, the Court refused to make any order.

This was an application for the custody of an infant, pending suit, on behalf of the wife, who had petitioned for judicial separation by reason of the alleged cruelty of the husband. The marriage took place on the 2nd of January, 1861, and the child was born on the 3rd of October. The petitioner had left her husband's house and the child there on the 29th of January, 1862.

Dr. Spinks now applied for the custody of the child to be given to the mother, pending suit. The 35th section of the Divorce Act, 1857, gives the Court a discretionary power in respect of interim orders as to the custody of children. The 2 & 3 Vict. c. 34 (Talfourd's Act) would appear a proper guide for the Court in such a case; and, to a child seven months old, the mother's right seems paramount. The father intends to sell off his goods and go abroad.

Mr. Aspland, contrà: The father is, at Common Law, entitled to the custody of a child, however young (*Re Alicia Race,* 7 Ell. & B. 186). The Court cannot now go into the merits of the parties; there is no suggestion that the child is not properly cared for; in fact, the affidavits show that the child has thriven better since the mother left.

1862.
April 16.

CARTLIDGE v. CARTLIDGE.

THE JUDGE ORDINARY: There are certain principles which I must keep in mind:—First, that the father has the Common Law right to the custody of the child. Secondly, I quite agree with Dr. Spinks, that the 35th section of the Act gives the Court a discretionary power pending suit; but I think I ought to exercise that power with reference to the *primâ facie* legal right of the father, and the petitioner must establish a case beyond the mere natural desire of a mother to have the custody of her infant child. On the whole of these affidavits it is quite clear to my mind, that the child is healthy, and at least as thriving as when the mother was with it. There is no proof that the mother's health is injured, or that she is capable of suckling the child. It being unnecessary then, on account of either the mother or the child, I think I ought not to remove it; but, inasmuch as it is intimated that the husband may sell off and go out of the jurisdiction, I reject the motion only on condition of an undertaking being given by the husband, that he will not move the child from where it now is without the sanction of the Court; and the mother ought to have reasonable access to it.

May 18 & 20.

LEETE v. LEETE.

(*Motion to set aside Demurrer.*)

LEETE *v.* LEETE.

Wife's Petition on ground of Cruelty.—Demurrer.—Motion to set aside.—Pleading.—Practice.

It is not necessary that every paragraph in a petition by reason of cruelty should allege a fact or facts on which, if proved, the Court could found a sentence. Some allegations short of this are admissible, as showing the habits and animus of the party charged.

Allegations of actual violence, however general as to time and place, can only be met by an application on summons for particulars.

SEMBLE, a party is not at liberty to traverse and demur at the same time, without leave of the Court.

This was a question arising on the pleadings in the wife's petition for judicial separation by reason of cruelty.

The third paragraph of the petition was in general terms, viz.:—"That since your petitioner's said marriage, the said "W. S. L. has, on divers occasions, treated her with cruelty.

"4. That on an occasion, happening in the month of "August, 1853, her said husband threw a silver spoon at "her with great violence, making use of a foul oath at the "same time.

"6. That on an occasion, happening in or about the month "of December, 1855, whilst sitting in the room just after "dinner, and without any provocation on her part, the said "W. S. L. threw a walnut at her head with great violence.

"8. That the said W. S. L. was continually in the habit of "using insulting language to the petitioner, and taunting and "abusing her in the presence of the governess and the ser-"vants.

"9. That your petitioner's said husband was in the habit of "returning home at all hours of the night, and after abusing "the petitioner in very bad language, would beat, kick, and "strike the petitioner, and has frequently severely bruised "and hurt your petitioner on various parts of her person, "and has ejected her from the bedroom; but that your peti-"tioner is unable to set forth the particular occasions when "this occurred."

The tenth, eleventh, thirteenth, fourteenth, and fifteenth paragraphs, specified acts of personal violence during the year 1861.

To the petition the respondent filed an answer—first, denying the truth of the allegations in the paragraphs of the petition from the third to the sixteenth inclusive; secondly, demurring to the fourth, sixth, and eighth paragraphs of the answer as bad in substance, on the ground that none of the matters therein alleged would be any warrant for the relief prayed; thirdly, demurring to the ninth paragraph, on the ground that

1862. May 13 & 20. LEETE v. LEETE.

the respondent was not legally bound to answer charges of such a character, in respect of which, the petitioner declares herself unable to specify any particular occasions.

The answer alleged, fourthly, that the petitioner, since the summer of 1837, had given way to habits of intoxication, and had been frequently intoxicated; fifthly, that if on any of the occasions in the tenth, eleventh, thirteenth, fourteenth, and fifteenth paragraphs of the petition specified, the respondent used any force or personal violence towards the petitioner, such force or personal violence was rendered necessary by the violent and outrageous conduct of the petitioner while intoxicated. Upon this, the petitioner's solictor gave notice of motion to direct the answer to be amended by striking out the second, third, and fourth paragraphs thereof.

Dr. Spinks, for the petitioner, moved the Court accordingly.

THE JUDGE ORDINARY: Your more strictly formal motion would have been to set aside the demurrers as frivolous; however, in substance, I think you have done so.

Dr. Swabey in support of the demurrers. In a petition for cruelty, every distinct substantive allegation of violence should be such as, if proved, the Court could found a sentence upon. Here the fourth paragraph charges that, in 1853, a silver spoon was thrown with great violence at the petitioner, and there it ends. So in the fifth, that in December, 1855, a walnut was thrown at her with great violence. It is impossible to say that a decree of the Court could be founded on such charges, if proved: they rather tend to throw an air of ridicule over the whole matter; as to which, and the impropriety of admitting such charges, see Lord Stowell's remarks in *Evans* v. *Evans*, 1 Consist. 69. As to the eighth paragraph, insulting and abusive language, even in the presence of third persons, not alleged to have affected health, does not amount to legal

cruelty. [By the COURT: Has not Lord Brougham stated that mere language might, under certain circumstances, be treated as cruelty, or at least entitle the wife to a judicial separation?[1]] There is no allegation of any injury resulting here. As to the ninth paragraph, the petitioner sets out abundance of violence over a period of nine years (the marriage was in 1853), and says she cannot set forth any particular occasions. As she does specify one act in August, 1853, another in December, 1855, and several on occasions sufficiently pointed out, in 1861, it must be taken that this paragraph is incapable of amendment, and that in its present shape the respondent is not bound to answer it, or the petitioner to give evidence on it. As to the objection to the fourth paragraph of the answer, it was not intended to raise an issue of the petitioner's drunken habits, except in connection with the averments in the fifth paragraph; but in that connection it must in some shape be admissible.

THE JUDGE ORDINARY: As to the charge of intoxication against the petitioner, the form of pleading may be set right by adding to the fifth paragraph, "as in the last preceding paragraph alleged;" there will then be no doubt of the intention of the general charge in the fourth paragraph. With respect to the demurrers, I have a strong impression at present that they cannot be sustained, but I will take time to consider. *Cur. adv. vult.*

May 20.

THE JUDGE ORDINARY: This is a case in which I was asked to strike out two paragraphs of an answer to the wife's petition for cruelty as frivolous: the first was a demurrer to the fourth, sixth, and eighth paragraphs of the petition, on the ground that the matters therein alleged, were not any warrant for the relief prayed. I find also, which escaped my notice at the time of the argument, that in the first paragraph of the answer

[1] Per Lord Brougham, in *Paterson* v. *Russell*, 7 Bell App. Cas.

1862. May 20.

LEETE v. LEETE.

the party has traversed the averments of the paragraphs demurred to; that was a work of supererogation if they were not to be taken into account. The demurrer, therefore, cannot be allowed.

But on principle also, I am of opinion that this demurrer cannot be allowed. It is very true that the acts alleged might or might not turn out to be sufficient to establish the charge of cruelty. The paragraphs objected to contain charges of throwing a silver spoon and throwing a walnut with great violence. Now, in the first place, I am not aware that it is necessary that each paragraph should in itself allege an independent act of crulty upon which the Court could found a sentence. Secondly, before you can succeed on demurrer, it must be apparent on the face of the allegation that it could not amount to an act of cruelty, whatever might be the evidence of the transaction and its circumstances. The only mode of assailing these allegations would be by special demurrer; and I do not intend to sanction any proceedings analogous to the old Common Law special demurrer. I cannot say that a silver spoon, or even a walnut, might not be thrown with such violence as to injure a woman—striking her, for example, on the face. Short of this, it may serve to show the temper and habits of the man charged with cruelty; so it is often stated in a distinct paragraph that foul oaths and abusive language were used, though it is true that hard words break no bones. The ninth paragraph is very general; but if the husband felt that he was at any disadvantage by reason of the generality, the proper remedy was to have applied on summons in chambers for particulars.

1862.
May 15.

JEWELL v. JEWELL.

JEWELL v. JEWELL.

Petition on Ground of Cruelty.—Pleading.—Practice.

Evidence to prove a species of cruelty not pleaded in the petition is not admissible; though evidence of violent demeanour and language not pleaded, but leading up to and making probable acts of violence pleaded, may be admissible.

This was the wife's petition for dissolution by reason of adultery and cruelty.

The petitioner's case was conducted by *Dr. Spinks*, who, in examining the petitioner's brother, elicited some statement as to the mark of a bite on the petitioner's hand.

Mr. S. Harding Giffard, for the respondent, objected to this evidence, that no charge of violence answering to that description was laid in the petition.

Dr. Spinks submitted that he was entitled to give evidence on matters not specifically pleaded, as they tend to show the probability of the charges specified and proved; that even under the general charge of cruelty such evidence would be admissible—cruelty, generally speaking, being an aggregate of particular facts.

THE JUDGE ORDINARY: I think I ought not to admit this evidence. Evidence of violent demeanour and language leading up to and making probable acts of violence charged may be admissible, though not specifically pleaded; but, as to actual cruelty, it is on the aggregate *secundum allegata et probata* that a petitioner is entitled to the relief prayed; as to this, I think you are limited to the occasions and matters specified in the petition.

1862.
May 27.

HUNT
v.
HUNT AND DUKE.

HUNT *v.* HUNT AND DUKE.

Answer of Co-respondent.—Pleading.—Adultery.—Practice.

Where the co-respondent charged the petitioner with having committed adultery with three females, named, without time or place, in one and the same paragraph of the petition, the Court refused to let the petition be amended by alleging the adultery with each of the three females in three distinct paragraphs, with time and place, on the ground that the inconvenience arising from the mode of pleading might be corrected by applying for particulars.

A petition had been filed in this case by the husband, charging his wife with adultery with the co-respondent.

The co-respondent had filed an answer, denying the adultery, and recriminating adultery against the petitioner.

Paragraph five of the answer (to which objection was now taken) was as follows:—

"5. That in and prior to the month of December, 1861, the petitioner committed adultery with three females of the names of Reed, Gates, and Lizzie."

Dr. Tristram now moved the Court to direct the answer to be amended, by alleging the charges of adultery with each of the three females in three separate paragraphs, with the dates and places of the adultery charged. The co-respondent here raises three distinct issues with three different females in one and the same paragraph. This is contrary to the authorized and usual mode of pleading. The practice has been, where adultery is alleged with several persons whose names are known, to make a distinct charge of adultery with each person in a different paragraph.

THE JUDGE ORDINARY: It would have been more correct to have pleaded the adultery in separate paragraphs; but I

1862.
May 27.

HUNT
v.
HUNT AND DUKE.

think it is unnecessary to direct the answer to be amended on this ground. All the information you require can be obtained on a summons in chambers for particulars.

Mr. R. Searle, for the co-respondent, asked for the costs of the motion.

THE JUDGE ORDINARY: No; I will not give you the costs of the motion. The mode of pleading the adultery is not correct.

May 10 and June 11.

LAWRENCE
v.
LAWRENCE.

LAWRENCE *v.* LAWRENCE.

Petition for Dissolution.—Desertion.—Conduct of Husband.—Letters of Husband.

B. and C. married in 1851, and cohabited in England till 1856, when—but under what circumstances did not fully appear—B., the husband, went to China, holding an office in the Commissariat. C. and the only child of the marriage remained in England. By letters written from B. to C. between February and December, 1859, it appeared that B. had led a most extravagant life in China, and had been found guilty by a court-martial of embezzling moneys; that C. and her family had treated B. liberally in respect of money, and in the course of 1859 provided him with considerable sums, on his representation of amendment, and intention of going to Australia. These letters expressed affection for his wife and child, but no desire to join them, or to be joined by them. B. came through Paris to London, instead of going to Australia, and on the 10th of December, 1859, wrote to his wife saying that he had spent all his money, and incurred divers liabilities by borrowing and otherwise. He addressed a few lines to her on the 13th of December, which were the last he wrote, but made no attempt to see her. In November, 1859, he made the acquaintance of the woman with whom the adultery was proved, and in a letter to her, dated the 10th of August, 1860, wrote:—"I was forced "into a marriage some years ago with one who is very rich, and for "whom I had no love.... I was miserable in my home, and took a

1862.
May 10 and June 11.

LAWRENCE v. LAWRENCE.

"staff appointment abroad about three years ago. I have not seen "my wife for more than three years."

By her petition, dated the 7th of November, 1861, C. prayed for a dissolution of her marriage by reason of B.'s adultery and desertion; and the Court held that, construing B.'s letters by his acts rather than by their words, his conduct amounted to desertion.

This case was unopposed, but seems of consequence in respect of the circumstances that were held to constitute desertion.

The petition alleged as follows:—

"1. That your petitioner, then Augusta Jane Hay, spinster, "was, on the 15th day of January, 1852, lawfully married to "Edward Daniel Lawrence, at the parish church of St. George, "Hanover Square, in the county of Middlesex.

"2. That after her said marriage, your petitioner lived and "cohabited with her said husband, at Cambridge, in the "county of Cambridge; at Brussels, in the kingdom of Bel- "gium; at Gibraltar, in Spain; and lastly, at Eastwick Park, "near Leatherhead, in the county of Surrey; and that your "petitioner and her said husband have had issue of their said "marriage one daughter, aged eight years.

"3. That on the 5th of November, 1859, the said Edward "Daniel Lawrence deserted your petitioner without reason- "able excuse, and has ever since lived separate and apart from "your petitioner.

"4. That on divers occasions in the months of March and "April, 1860, the said Edward Daniel Lawrence committed "adultery with a female named Elizabeth, otherwise Eliza "Brown, in the Queen's Bench Prison, in the county of "Surrey.

"5. That in the month of May, 1860, the said Edward "Daniel Lawrence adulterously cohabited with the said Eli- "zabeth, otherwise Eliza Brown, at Westbrook House, Mar- "gate, in the county of Kent.

"6. That in and during the months of June and July,

"1860, the said Edward Daniel Lawrence frequently visited "the said Elizabeth, otherwise Eliza Brown, at Hemus Ter- "race, Chelsea, in the county of Middlesex, and on divers of "such occasions committed adultery with the said Elizabeth, "otherwise Eliza Brown."

The petitioner's case was conducted by *Dr. Deane*, Q.C., *Dr. Wambey*, and *Mr. Browning*.

The petitioner was examined on the desertion; but the case as to that chiefly turned on the respondent's letters, which are noticed and partly set out in the judgment.

Cur. adv. vult.

June 11.

THE JUDGE ORDINARY: This was a petition by a wife for dissolution of her marriage by reason of the respondent's adultery and desertion for two years and upwards, without reasonable cause. The respondent did not appear.

At the hearing before me on the 10th of May, the adultery was fully proved, but I reserved for further consideration the sufficiency of the evidence of desertion. The marriage took place in January, 1851. One child (a daughter) was born of the marriage, and the parties lived together in England until 1856, when the respondent went to China, holding an appointment in the Commissariat. No evidence was given of the terms on which the parties had lived together, or of the circumstances which led to his accepting such an appointment, or which caused the petitioner to remain in England, save that which is found in a letter bearing date the 12th of August, 1860, addressed by the respondent to Eliza Brown, (whom it will be necessary to mention more particularly hereafter). In that letter he says:—"My only motive for conceal- "ing from you that I was married was that I knew you would "cast me off, as you often said that you would never have any- "thing to do with a married man. Although you cannot bring

1862. May 10 and June 11. LAWRENCE v. LAWRENCE.

"yourself to think so, I have loved you, do love you, with my "whole heart and soul. I could not bring myself to tell you, "as I knew I should be cast off by you, and that I could not "bear. I was forced into a marriage some years ago with one "who is very rich, and for whom I had no love; that mar- "riage has been the curse of my life. I was miserable in my "home, and took a staff appointment abroad about three "years ago. I have not seen my wife for more than three "years."

Taking his own account of his motives for leaving England, and of his feelings towards the petitioner, the Court may safely conclude that he had no wish to return to cohabitation with her; but that letter does not satisfy me that he had, when he left England, formed a resolution to desert her. His subsequent history is also to be collected chiefly from his own letters which were put in evidence. On the 14th of February, 1859, he wrote to his wife thus from Hongkong:—"My dear "Augusta,—If you only knew what my feelings are, I am "sure you would pity me. I am to be brought to a court- "martial in consequence of the bills being dishonoured. I "must now tell you all. I have been ashamed to write to you "to tell you of my fearful extravagance. I have never been "free from debt since I have been here. I have been obliged "to send money to Gibraltar, Constantinople, and London. "I have been very extravagant; when I first came here I lost "a large sum of money at the races; I was obliged to borrow "money to pay these debts, at an enormous rate of interest, "and then to borrow again to pay the sum off. I have spent "a great deal of money at the club, giving dinners, etc. I lost "over £300 out of the chest in bank-notes, through careless- "ness, and I had to borrow this sum to pay it into the chest, "so that the head should not know anything about it, or I "should then have been brought before a court-martial. This "is a very expensive place: the dollar does not go further than "shilling in England; if you draw bills on England, the loss

"is very great. I have drawn bills upon home to the amount "of £593. Three bills have already been sent back dishonoured, and I owe £800 more here, making a total of "£1400. I know it is useless for me to say I am sorry, for "you would not believe me; but if you could read my heart, "you would know how truly miserable I am, and for how "many long weary months my life has been a burden to me. "Oh! dear Augusta, can you do anything to save me? I "know I have no right to expect mercy or pity from any "one," etc.

Again, on the 25th of February, he wrote thus:—"My "dearest Augusta,—I have enclosed a long letter to Robert, "which, of course, you can read, but please forward it to him "with as little delay as possible. I have told him everything "concerning my debts here. I have implored him to try and "save me for the last time; I know I do not deserve to have "any mercy. I have cruelly deceived you, my parents, your "mother, every one; you have all been too kind, too good to "me. My life, ever since I married you, has been one great "falsehood. I have never been quite free from debt. I think "how happy I might have been with you and my dear child "if I had only acted properly towards you both," etc. On the 21st of May, he wrote thus:—"Stanley, 21st May, 1859. "My dearest Augusta,—Words cannot express how grateful "I felt for your kind and affectionate letter. I expected reproaches, and to be cast off for ever; instead of that, I meet "with nothing but love and goodness. If anything can add "to the bitter pangs I now suffer, it is the knowledge that I "have made such a wicked return for all the great and undeserved kindness I have experienced at the hands of those "who love me. I can never, never forgive myself for the past. "I have been a very bad husband to you, and made you very "wretched; let me entreat you to forgive me," etc.: thus bearing testimony to the continued affection of his wife, but not a word indicating even a wish to return to her. On the

1862. May 10 and June 11.

LAWRENCE v. LAWRENCE.

9th of August again, from Hongkong, he announced his determination never to return to England:—"As I am not "coming to England, and being a person of small consequence, "this painful affair will soon be forgotten. People will have "other things to think about. To England I can never come "again," etc. On the 28th of August, he wrote again from Hongkong, affecting still attachment to his wife and child, but not expressing any desire to return to them or have them with him:—"I will indeed write regularly by every mail, "which I see leaves Australia on the 20th of every month. "The mail leaves England on the 12th of every month, and "takes between fifty and sixty days to reach Australia. I "trust, dearest Augusta, that you will write long letters by "every mail, and tell me everything about yourself and the "darling;" and repeating his determination never to return to England.

It appears that he left Hongkong for Alexandria, pretending that thence he should take his passage to Sydney, and he urged his wife to prevail on her mother to send him £200, which was done; and on the 22nd of October, 1859, he wrote from Alexandria the following letter:—"My dearest Augusta, "—I received your kind letter of the 2nd of October, also "the £220; very many thanks for both, it is the last sum I "shall ever call upon you for; if God gives me health, I am "determined to earn enough to live upon. It is very good of "you to have had dearest Ada's picture taken for me. You "had better keep it till I can tell you where to send it to. I "have determined on going to Sydney. My eyes are still "very bad; I hope to start from this on the 25th. Please "direct, Post Office, Sydney. I was much disappointed in "not receiving a letter from you according to promise by the "Marseilles boat, leaving England on the 10th. I shall feel "very lonely and very miserable. Do try and believe, dearest "Augusta, that my intentions are good, and that in a new "country I will indeed lead a new life. Pray thank your

"mother and Robert for their very kind letters; I cannot an-
"swer them now, but will on arriving in Sydney. May God
"bless and preserve you and darling Ada. Ever your affec-
"tionate husband," etc.

The next information which the petitioner received of his movements, was by a letter dated London, the 10th of December, in the following terms:—"For days and days I have "been thinking to bring myself to write to you. I must now, "though I have not the least hope that you will take the least "notice of my communication. At the last moment, though "God knows with the best intentions, I could not bring my-"self to leave for Australia. I went to Paris; lost a large sum "of money at cards, hoping to increase what I had. I have "no excuse to make, save that remorse and misery made me "reckless and mad, and made me do things for which I scorn "and loathe myself. I owe altogether, with old and new "debts, about £550. I have behaved shamefully. I have "made use of your name in one instance, and in one your "mother's, to obtain articles which I sold for a mere trifle. "When I arrived in London, now nearly a month ago, I was "obliged to pay back a Russian gentleman, with whom I tra-"velled from Venice, what he lent me in Paris, to enable me "to pay my hotel bill and reach England. When I write this "I have just enough to pay my railway fare to where I am "going. I do not ask you for money for myself, as I must "take the consequences of my own wickedness; but I implore "you to pay those whom I have deceived, and who have lent "me money. One is a naval officer I knew well in China, "Captain E. Maddan, R.N., Thursland Cottage, Villiers "Road, Southsea. He most kindly lent me £17, much to his "own inconvenience. I gave him a bill, which will be pre-"sented at Hoare's on Monday. For God's sake send him "the money. Say nothing about me. Oh, spare me, for the "sake of yourself and others. I owe a bill at Fenton's Hotel, "St. James Street, since the 29th of November. I have left

1862. May 10 and June 11. LAWRENCE v. LAWRENCE.

"some things in my room there; they think I have gone down "to Portsmouth. I said I should return to-day, Saturday. "Hallstaff has lent me £33. 10*s.*, for which he has a bill, "which will be presented on Monday at Hoare's. The head "waiter at the New Hummums Hotel (Robert) has lent me "£5, for which he has an I O U. Let me implore you, if "possible, to pay them. I have deceived them. They lent me "the money from the kindest motives. Do not blame them; "let all your anger fall upon me. Do not expose me to them. "Let me not be an object of scorn and loathing to them, par- "ticularly to Maddan, who has behaved so nobly to me. He "has heard a report stating that I left China owing £400 to "Baynes. Let me earnestly beg of you to clear me in this "respect. State to him what you know to be a fact, that I "left China perfectly free from debts. I do not think I can "stand this remorse and misery, my life is truly such a burden "to me. If you wish to hear anything further of me, will you "put an advertisement in the *Times*, headed 'L. D.'? Do not "say anything that will make any one know it is for me. I "shall know where to direct. Oh, may God forgive me! I "feel He never can.—Your truly miserable EDWARD."

The manner in which he had occupied the time between his arrival in England and the date of that letter was proved by other witnesses. Mrs. Macdonald, the mother of Captain Maddan, R.N., whose name appears in respondent's letter of the 10th of December, proved that he stayed at their house for ten or fourteen days; and Eliza Brown proved that, on the 12th of November, she met him at the Crystal Palace, Sydenham, and that she afterwards cohabited with him; and in July, 1860, he took the oath required for obtaining a licence to marry Eliza Brown, but no such marriage was solemnized. The petitioner did not put any advertisement in the paper, as suggested in his letter of the 10th of December. He wrote a few lines to her on the 13th of December, saying that he had not sixpence left, but made no attempt to see her, and never wrote again.

1862.
May 10 and June 11.
LAWRENCE v. LAWRENCE.

The result of the evidence, then, is this. In 1856 the respondent went to China, and says of himself that he had been miserable with his wife, and therefore accepted a foreign appointment; from Hongkong he wrote repeatedly, pretending affection, which, according to his own account, he did not feel; avowing, from time to time, that he was leading a very reckless life, making hypocritical professions of a desire to reform his habits, always pressing for money, but never showing the slightest inclination to return. The next stage of his career was being brought to a court-martial and dismissed the service, whereupon he avowed a determination not to return to England, but to seek his living and amend his manners in a foreign land, and praying for pecuniary assistance. This having been granted by the petitioner's mother, he abandoned his virtuous projects, visited Paris, there lost at a gaming-table the money that had been so supplied, then came to England, and was there for a month, without communicating with his wife or her friends, and in that time formed an illicit connection with a young woman, for whom he professed the greatest affection, and with whom, it seems, he at one time contemplated committing bigamy. At the expiration of the month, being penniless, he again wrote to his wife, not expressing any desire to see her, and not giving his address, but requesting her to put an advertisement in the newspaper, if she wished to hear further of him.

Construing his letters by his acts rather than by their words, I have come to the conclusion that, probably from the time when he left England—certainly from the time he left Alexandria—he never intended to return to his wife; the professions of attachment in his letters being hypocritical falsehoods, written for the purpose of obtaining money wherewith to pursue his profligate career in a foreign land. He had, therefore, deserted her for more than two years before her petition was filed; and on the ground of his adulterous intercourse with Eliza Brown, coupled with such desertion, I pronounce a decree *nisi* for the dissolution of his marriage with the petitioner.

1862.
May 17 and June 3.

WADDELL v. WADDELL.

WADDELL v. WADDELL.

Wife's Petition.—Adultery.—Cruelty.

A wife, married in 1842, discovered in May, 1861, an adulterous intercourse of her husband, left his house, and petitioned for dissolution by reason of adultery and cruelty. It was proved that her husband struck her in the face in 1852; it did not appear that since that he had intentionally struck her; but he had, while drunk, cut her hand, and in 1858 had cut her finger by throwing a jug of water at her. There was also evidence of his having frequently thrown cold water over her, and of several times having spit in her face.

And the Court held she was entitled to a dissolution of the marriage.

In this case the wife petitioned for a dissolution of her marriage by reason of her husband's adultery and cruelty. The husband did not appear, and the adultery was clearly proved, but the Court took time to consider whether the cruelty was established.

The petitioner's case was conducted by *Dr. Deane*, Q.C., and *Mr. W. Downing Bruce*.

The petition alleged the following acts of cruelty:—

"That on divers occasions in the month of June, 1852, the "said Henry William Waddell, while living and cohabiting "with your petitioner at No. 7, Manor Terrace aforesaid, "without provocation, violently assaulted and struck your "petitioner on the eyes, causing her nose and mouth to bleed "to a serious extent, and the effects of these assaults were "visible for two months afterwards on your petitioner's face.

"That, on or about the 2nd day of March, 1851, at No. 7, "Manor Terrace aforesaid, the said Henry William Waddell, "without any provocation, maliciously cut your petitioner's "hand with a knife.

"That, on or about the 5th day of June, 1852, at No. 7, "etc., the said Henry William Waddell, without any provo- "cation, threw a glass of hot brandy-and-water at the face of

1862.
May 17 and June 3.

WADDELL v. WADDELL.

"your petitioner, which caused her great suffering and inflammation in the eyes.

"That, during the aforesaid cohabitation of your petitioner and the said H. W. Waddell, the said H. W. Waddell committed divers other acts of cruelty towards your petitioner."

The adultery was charged between the 13th day of March, 1859, and the 22nd of March, 1861.

The petitioner left her husband's house in May, 1861, when she had become aware of his adulterous intercourse. The Court took time to consider the sufficiency of the evidence of cruelty, which is stated in the judgment.

Cur. adv. vult.

June 3.

THE JUDGE ORDINARY: This was a petition by a wife for a dissolution of her marriage on the ground of cruelty and adultery. The respondent did not appear.

The petitioner proved that for some time after her marriage, which took place in 1842, her husband behaved kindly to her, but that he afterwards contracted irregular and intemperate habits and then treated her with cruelty, using continually very foul language, and treating her, if not with actual violence, yet with so much indignity as rendered a continuance of cohabitation scarcely bearable. Some acts of violence were stated by the petitioner to have been committed from time to time. In 1852, on some trivial dispute taking place when he was drinking hot brandy-and-water, he threw it in her face and made her eyes smart very much. In the same year, having come home intoxicated at night, he ordered her to clean his boots while he was still lying in bed; she, being irritated, told him to clean them himself, and threw them at him, whereupon he gave her a blow on the face with his hand, which gave her a black eye and cut her lip. In this instance the petitioner was certainly not free from blame, and if the blow had been of a less severe character it might have been treated as a venial offence. The manner in which the peti-

1862. May 17 and June 3. WADDELL v. WADDELL.

tioner gave her evidence was calculated to raise a suspicion that she spoke under the influence of excited feelings, and might therefore probably indulge in some exaggeration. But her evidence as to the injury sustained was corroborated by a witness named Tucker, who was in the house as a visitor at the time, and the respondent afterwards expressed to him his sorrow that he had been guilty of such an act, and begged him not to make it known to the petitioner's family.

It did not appear that the respondent ever struck her again, but in 1855 he came home tipsy when she was in the act of cutting some bread; he desired her to desist, and because she did not, he pulled the knife out of her hand, and in so doing inflicted a severe cut. The evidence did not cause me to believe that he intended so to wound her, but the act was a very reckless one, and showed that it was dangerous to be with him when in liquor.

At another time, in 1858, as she was going upstairs, he pulled her back so as to throw her down and injure her ankle; that injury was not of any importance, but the act shows his want of self-control when intoxicated. In the same year he threw a jug full of water at her: it struck her hand, and cut one of her fingers. In addition to the wife's evidence of these specific acts, which was corroborated by servants, she deposed to his having frequently thrown cold water over her, and to his having on many occasions spat in her face, as to which also she was corroborated by a person who had been for some years in her service. Of this act Dr. Lushington, in *Saunders* v. *Saunders*, 1 Rob. 562, said: "So gross a personal in-"sult would be insufferable in the lowest grades of life. How "much more criminal, how much more painful to the feelings "of the injured wife when such an offence takes place between "those who have been accustomed to the decencies of society, "and have been educated to entertain a high regard for "them." In that I entirely concur, but I think that the *dictum* of the judge of the Consistory Court, in *Westmeath* v.

Westmeath, 2 Hagg., supp. 52, is also applicable to the same subject: "A natural test of injuries of this kind is the sense "in which they are received. If they are not resented as in- "juries at the time, a state of things intervenes which either "detracts from the weight of the particular evidence when "brought forward at a subsequent period, or may introduce "quite another view of the relative situation of the parties."

In this case, however, there was nothing to lead me to suppose that the insult to the wife would not be felt as an act of grievous cruelty. I may say in this case, as Dr. Lushington said in *Saunders* v. *Saunders*, that I am not called upon to decide what would be the effect of such an act taken by itself; it suffices to say that, combined with the other acts proved, it would have constituted a sufficient ground for the interference of the Court if the wife had made her complaint at the time. It is true that all these acts were from time to time condoned, but were revived by the adultery committed by the husband from September, 1859, to November, 1861, which was fully proved, but of which the wife was not cognizant during any part of their cohabitation.

On the two grounds, then, of adultery and cruelty, I feel bound to make a decree *nisi* with costs.

CASES

IN THE

COURT OF PROBATE.

1862.
July 1.

In the Goods of THOMAS FAIRWEATHER (deceased).

Section 73 of Probate Act.—Creditor.—Secretary of an Association.

In the Goods of THOMAS FAIRWEATHER.

The Court will not make a grant of administration under the 73rd section of the Probate Act to a party entitled to a grant in another character.

The Court declined to make a grant *de bonis non* with the will annexed under the 73rd section to a creditor without citing certain residuary legatees named in the will, who were resident in Australia.

Where an application is made for a grant of administration to the secretary of an association, on the ground that the deceased was indebted to the association, the Court ought to have such information of the constitution of the association as would show that the secretary can be treated as a creditor.

Thomas Fairweather, late of No. 6, Charlotte Square, Newcastle-upon-Tyne, schoolmaster, died on the 29th of August, 1860, leaving a will, of which he appointed his wife, Jane Fairweather, and Thomas Leslie executors; he bequeathed all his property to his executors, in trust to pay the annual income thereof to his wife for her life, and after her decease he gave one moiety thereof to his nephew John Fairweather, and the other moiety to the children of his brother, Rowland Fair-

1862.
July 1.

In the Goods of THOMAS FAIRWEATHER.

weather. Thomas Leslie died in the testator's lifetime, and Mrs. Fairweather proved the will as surviving executor, and afterwards (on the 20th of March, 1861) died intestate, leaving part of the deceased's estate unadministered. The deceased, at the time of his death, was indebted to the Schoolmasters' Association for the North of England, in £89. 14*s.* for money drawn by him from the treasurer of the corporation of the borough and county of Newcastle-upon-Tyne, on account of the said Schoolmasters' Association. The debts now due from his estate (including the sum due to the association) amounted to £265. 1*s.* 7*d.*, and the unadministered assets to £107. 8*s.* 3*d.*

A renunciation and consent to the grant being made to Mr. Michael Watson, as treasurer of the Schoolmasters' Association, had been filed on the part of the said John Fairweather, the residuary legatee substituted of one moiety of the deceased's property. There were five children of Rowland Fairweather, who were entitled to the other moiety of the residue, all of whom were resident in Sydney, in New South Wales, and had no agent in this country.

Dr. Tristram moved, under the 73rd section of the Probate Act, for a grant of administration *de bonis non* with the deceased's will annexed to be decreed to Michael Watson.

SIR C. CRESSWELL: The 73rd section of the Probate Act does not apply to this case. Watson claims to be a creditor of the deceased's estate, and if so, he should take the grant in that character, and not in the inferior character of a nominee of the Court under the 73rd section of the Probate Act.

In consequence of the rejection of this motion a citation issued against the children of Rowland Fairweather, an abstract of which was duly advertised in three newspapers, according to the practice of the Court, but no appearance had been entered thereto.

1862. July 1.

Dr. Tristram now moved the Court to make the grant to Mr. Watson, as a creditor of the deceased.

In the Goods of THOMAS FAIRWEATHER.

SIR C. CRESSWELL: You do not show how he is a creditor. It appears that the deceased owed a sum of money to the Schoolmasters' Association for the North of England, of which Watson is treasurer. That will not necessarily make Watson a creditor.

Dr. Tristram: The treasurer would be entitled to give receipts for the association, and probably to sue for debts.

SIR C. CRESSWELL: It does not appear that he has authority to sue for debts. I have no information as to the constitution of the association, and in the absence of such information, I cannot grant the motion. *Motion rejected.*

July 22 and 29.

In the Goods of THOMAS DUANE (deceased), on Motion.

In the Goods of THOMAS DUANE.

Will.—Clause introduced per Incuriam.—*Probate.*

Where a clause is introduced in a testamentary paper *per incuriam*, and the deceased executes the paper, not having given any instructions for, and being ignorant of the existence of such clause, it forms no part of the will of deceased, and probate will be granted of the remainder of the paper, omitting such clause.

In this case the deceased, a serjeant-major in the 64th Regiment of Foot, died on the 3rd of October, 1861, having duly executed a testamentary paper by his mark, on the same day. The paper consisted of a skeleton printed form, supplied by the War-Office; in the present instance headed, in print:—"Form of will, No. 3. To be used by a soldier de-

1862.
July 22 and 29.

In the Goods of THOMAS DUANE.

"sirous of leaving money to be invested for the benefit of his "child or children;" and, after some printed and some blank lines, with printed directions alongside for particular bequests, it ended in print thus:—"And the rest of my estate and "effects, and everything that I can give or dispose of, I de- "sire may be sold, and the proceeds invested under the orders "of the Secretary of War, for the equal benefit of my children. "In witness whereof I the said have hereunto set my "hand," etc.

From the affidavit of C. F. F. Wood, a clerk in the military purveyor's department of the War-Office, and one of the subscribed witnesses to the mark of the deceased, it appeared that he was sent for on the 3rd of October, 1861, to prepare the will for the deceased, who was then in hospital; that he took with him the above-mentioned printed form; but on seeing the deceased, received from him instructions to prepare his will, leaving the whole of the property to his wife; and accordingly, after the printed line, "after payment of my just debts and "funeral expenses, I give to my," filled up in writing, "wife, "Elizabeth Duane, all my goods and chattels." Wood then read over to the deceased, from the paper so printed and filled up in writing, "This is the last will of Serjeant-Major Thomas "Duane, No. 3160, of the 64th Regiment of Foot. After "payment of my just debts and funeral expenses, I give to my "wife, Elizabeth Duane, all my goods and chattels." He did not read the remainder of the printed form, or advert to it as having any effect, but filled up the testimonium clause, and the deceased then made his mark.

Dr. Swabey now moved the Court to grant letters of administration with the will annexed to the widow, omitting the residuary clause in favour of the children, which was not read over to the deceased, and in respect of which no instructions were given. Williams, J., on Executors, p. 330 of 5th edition, says: "It is a necessary consequence of some of those rules

1862. July 22 and 29.

In the Goods of THOMAS DUANE.

"of Courts of Probate, which there has already been occasion "to notice, that a will may be in part admitted to probate "and in part may be refused. Thus if the Court shall be "satisfied that a particular clause has been inserted in a will "by fraud without the knowledge of the testator in his life-"time, . . . probate will be granted of the instrument with "reservation of that clause;" and refers to *Barton* v. *Robins*, 3 Phill. 455, note. (See also *Allen* v. *M'Pherson*, 1 H. of L. 191, cited in Deane's Wills Act, p. 49, and in Williams on Executors, p. 331.) The principle seems applicable to the present case, and if in the passage cited the words "*per incu-*"*riam*" are substituted for "by fraud," of which in this case there is no suggestion, it would be a direct authority.

Cur. adv. vult.

July 29. SIR C. CRESSWELL, after stating the facts as above, said:—*Allen* v. *M'Pherson*, decided in the House of Lords, shows that a Court of Probate has authority to omit from probate a clause introduced into a will by fraud, although it formed part of the will when executed. I can see no difference in principle between that case and the present one, where a clause, for which the deceased gave no instructions, and which was not read over to him, formed, *per incuriam*, part of the document signed by the deceased. I think administration with the will annexed may go, omitting the residuary clause in favour of the children.

1862.
July 22 and 29.

In the Goods of THOMAS DOUCE (deceased), on Motion.

Execution by Mark.—Wrong Name.—Probate.

In the Goods of THOMAS DOUCE.

A. B. put his mark to a testamentary paper in which he was throughout described as C. B. The Court, being satisfied on affidavit that A. B. duly executed the paper by mark *animo testandi*, granted probate thereof as his will.

In this case, Thomas Orme, a schoolmaster, since deceased, wrote a will for the deceased, Thomas Douce, who could neither read nor write. Orme, mistaking the Christian name, described the deceased throughout as *John* Douce, of Witherby, in the county of Leicester, labourer, and wrote against the mark by which the will was executed, "The mark of John "Douce." The will referred by name to five children of the testator. From the affidavit of Henry Orme, who, with his father the said Thomas Orme, subscribed the will, it appeared that before the execution of the will it was fully explained to Thomas Douce by Thomas Orme, that it was prepared and written by Orme as and for the will of Thomas Douce, and that the name "John" in the introductory words of the will, in the testimonium clause, etc., was inserted in error and by mistake for Thomas, which was the real Christian name of the testator, and by which he was well and commonly known; that at the date of the will there was no person answering the name and description of John Douce, of Witherby, in the county of Leicester, labourer, other than the testator's son, John Douce, mentioned in the will. It was also stated on affidavit that the deceased Thomas Douce had the children whose names were mentioned in the will as the children of the testator.

Dr. Swabey moved for probate as of the will of Thomas Douce to be granted to the executor named in the will. *The Goods of Eleanor Bryce*, 2 Curt. 325, comes nearest to the

1862.
July 22 and 29.

In the Goods of THOMAS DOUCE.

present case in circumstance; there a testatrix signed a paper by a mark, and no name appeared on any part of the paper. Sir Herbert Jenner, in disposing of that case, says: "The "paper is identified as being the will of the deceased; and, "being signed, etc., I am of opinion that the statute is suffi- "ciently complied with." Here a wrong name appears on the face of the paper, but if the Court is satisfied that it is identified as being the will of the deceased, it is submitted that it will be entitled to probate. (*In the Goods of Shuttleworth*, 1 Curt. 911, was also cited.) *Cur. adv. vult.*

July 29.

SIR C. CRESSWELL: In this case a person of the name of Thomas Douce, an illiterate man, placed his mark to a paper which had been prepared for him by a schoolmaster, against which mark the schoolmaster wrote John Douce, and throughout the document so described the testator. On application for probate it was objected that it was not the will of Thomas Douce; but I am quite satisfied that Thomas Douce was the man who put his mark to the paper, intending thereby to execute it as his will. The contents of the paper afford internal evidence of this, for it mentions the names of certain children of the testator, and these names are shown to be the names of the children of Thomas Douce. I had occasion to consider (*In the Goods of Susanna Clarke*, 1 Swab. & Trist. 22), whether a marksman signing, against whose mark a wrong name was written, was sufficient, and I held that it was. Here I am satisfied that Thomas Douce duly executed this paper by mark *animo testandi*, and that is as much as if he had written Thomas Douce; and the discrepancy between the real name and the wrong name which appears on the paper being fully explained, I think the will is entitled to probate.

1862.
July 22.

In the Goods of GEORGE JOHNSON (deceased), on Motion.

In the Goods of GEORGE JOHNSON.

Administration.—Renunciation of Next of Kin solely entitled.

In case of an intestacy, where the persons who are sole next of kin and the only persons entitled in distribution renounce their title to administration, the Court will make the grant to a person who would have been next of kin if the sole next of kin had been out of the way, although such person has no interest.

In this case George Johnson died in May, 1862, a bachelor, without a parent, and intestate, leaving him surviving five brothers, his only next of kin, and the only persons entitled in distribution. The five brothers had formally renounced their right to administration of the deceased's effects, and George Johnson, an uncle of theirs and of the deceased, had taken the oath with a view to take out letters of administration, but a difficulty was raised in the registry as to the uncle's want of interest.

Dr. Waddilove now moved the Court to grant administration to the uncle. In *The Goods of Mary Keane*, 1 Hagg. 692, administration was granted "to the Rev. Charles Edward Keane, the nephew, upon the renunciation of Benjamin Keane (his father), the brother and the only next of kin of Mary Keane, the intestate." In that case the nephew had no interest any more than the uncle in the present.

SIR C. CRESSWELL: On the authority of the case cited the grant may go as prayed.

1861.
July 24 and 27.
And
1862.
June 18.

HINGESTON v. TUCKER and HER MAJESTY'S PROCTOR (intervening).

(*Before* SIR C. CRESSWELL, *on Motion; and before* SIR C. CRESSWELL *and a Special Jury.*)

HINGESTON v. TUCKER and HER MAJESTY'S PROCTOR (intervening).

Will.—Queen's Proctor.—Alleged Next of Kin opposing.—Interest.—Practice.—Costs.

A party propounding a will may put any person opposing it on proof of his interest; but where two parties oppose a will, *e. g.* the Queen's Proctor and an alleged next of kin, neither can put the other on proof of his interest.

In this case, the plaintiff propounded a will of Thomas Lisle Follett, deceased, bearing date March the 18th, 1861.

The defendant Charles Benjamin Tucker, who claimed to be the cousin-german of the deceased and his sole next of kin, opposed the will, and on the 3rd of July, 1861, filed pleas, in which he alleged, first, that the will propounded was not the last will of the deceased; secondly, that it was not executed according to the provisions of 1 Vict. c. 26; thirdly, that at the time of its execution the deceased was not of sound mind.

The Queen's Proctor intervened, and on the 12th of July, 1861, filed similar pleas.

The Queen's Advocate (Sir J. D. Harding), on behalf of the Queen's Proctor, moved the Court to direct that before the question as to the validity of the will of the deceased should be tried, the defendant Tucker should propound and prove his interest as next of kin of the deceased. An affidavit of John Rutter, clerk to the Queen's Proctor, stated that he was informed and believed:—1. That the deceased died a widower without known relations. 2. That on the 18th of March, 1861, the deceased executed a will, the validity of

which was contested by the Queen's Proctor and by Charles Benjamin Tucker, a son of Sarah Tucker, deceased, formerly Sarah Follett, alleging himself to be the lawful cousin-german and sole next of kin of the deceased. 3. That the deceased left real estate producing a rental of about £615 per annum, and personal estate of the value of about £8800. 4. That the paternal grandfather and grandmother of the deceased were Benjamin Follett and Ann Pomeroy, who had the following children, namely: (1) Ann, born April 11, 1742; (2) John, born September 26, 1743; (3) Thomas, born August 17, 1744; (4) Benjamin, born February 5, 1748; (5) Samuel, born August 13, 1751; (6) Sarah, afterwards Sarah Tucker, born December 10, 1753; (7) Mary, born October 3, 1757; (8) Samuel, born March 25, 1760. 5. That the deceased was the son of Thomas Follett, deceased, the third child of the said Benjamin Follett. 6. That in the year 1812, John Follett, the second child of the said Benjamin Follett and brother of the said Thomas Follett, died intestate, leaving considerable real and personal estate, and it was represented to the Lords of the Treasury that he was illegitimate. 7. That commissions of escheat were thereupon issued for the counties of Dorset, Somerset, and Devon, in which the real estates of the said John Follett were situate; and evidence was given thereon, on the part of the Crown, that the parents of the said John Follett were not married (although every exertion was made by the family to find the certificate of their marriage, but without avail), whereupon the said John Follett was found to have been illegitimate, and the Crown took possession of his real and personal estate, and disposed of the same, according to the usual practice. 8. That, under the foregoing circumstances, the said Thomas Follett, the deceased's father, and the said Sarah Tucker, the mother of the defendant, were not born in wedlock.

The Queen's Advocate: According to the practice of the

1861. July 24 and 27. And 1862. June 18.

HINGESTON v. TUCKER and HER MAJESTY'S PROCTOR (intervening).

Prerogative Court, this would first have been turned into an interest cause. Tucker would first have been assigned to propound his interest. (Coote's Pract. of Eccl. Courts, 470, 641.)

SIR C. CRESSWELL: If the plaintiff had called on one of the defendants to propound his interest, there would have been no difficulty in making him do so. But, where two persons oppose a will, can one of them call upon the other to propound his interest?

The Queen's Advocate: I imagine so; at least, where one of the parties opposing is the Crown. The right to oppose a will is not inherent in the subject; he must show an interest. (*Brotherton* v. *Hellier*, 1 Lee, 599, see 600; *Wright* v. *Rutherford*, 2 Lee, 266; and *Bascomb* v. *Harrison*, 2 Rob. 118.) I admit these are not precisely in point.

SIR C. CRESSWELL: Suppose Tucker had not appeared, and the Queen's Proctor had contested the will with success, Tucker might then have come in.

The Queen's Advocate: Yes.

Dr. Spinks, contrà: The motion is not warranted by the practice of the Prerogative Court. In no case was one co-defendant allowed to put another to proof of his interest. The next of kin entered a caveat in March, 1861, the Crown in the following May. It is the Crown that intervenes, not the next of kin. The question of kinship may never require to be decided, *i. e.* if the will is established: if the will is invalid it may then be a question who is entitled; but the Queen's Proctor wants us to try the second question first.

Mr. J. T. Hopwood for the plaintiff.

1861.
July 24 and 27.
And
1862.
June 18.

HINGESTON v. TUCKER and HER MAJESTY'S PROCTOR (intervening).

SIR C. CRESSWELL: I will consider the matter. At present I think there is the objection to the motion, which Dr. Spinks points out. *Cur. adv. vult.*

SIR C. CRESSWELL now said: I have considered the cases cited. They clearly establish that before a person can be permitted to contest a will, the party propounding it has a right to call on him to show that he has some interest; but they go no further than that. No case has been cited, nor can I find one which will support the present application. In fact, the Queen's Proctor did not make the application because he thought Tucker had no interest, but because he thought he had an interest, and he wished to see if he was or was not the proper person to contest the will. I find no authority for granting such an application, when made by one party against another on the same side, and I must therefore reject the motion.

The issues in this case as between the plaintiff and defendant were tried before the Court by a special jury on the 18th of June, 1862.

Mr. Collier, Q.C., *Dr. Deane*, Q.C., and *Mr. Aspland*, for plaintiffs; *Mr. Karslake*, Q.C., and *Dr. Spinks*, for the defendants; *Dr. Twiss*, Q.C., watched the case on behalf of the Crown.

A verdict was found against the validity of the will.

Hingeston was condemned in costs of Tucker, but no order was made as to any costs incurred on behalf of the Crown.[1]

[1] As to the liability of the Crown to be condemned in costs on appeal in a Probate Cause, see *Dyke* v. *Barton*, 10 Moore, P. C. 458.

1862.

November 4.

In the Goods of THOMAS EELES (deceased), on Motion.

In the Goods of THOMAS EELES.

Will.—Cutting.—Dependent relative Revocation.—Probate.

Where a testator cut a piece out of his will which had been duly executed, containing the word "witnesses," and the names of the attesting witnesses, giving his reason, at the time, for having so cut the same, that he had some idea of altering it, and having a new will made; and subsequently, on the same day, refastened the piece he had so cut out, saying "that his will would do for the present, and that if he wanted another will made he could do it afterwards," and died without making another will:

The Court, on motion, but with the consent of the parties interested in case of an intestacy, granted probate of the will to the executors named therein.

Thomas Eeles, late of Carlton, in the county of York, stonemason, deceased, died on the 17th of May, 1862. On the 28th of August, 1859, the deceased duly executed a will in the presence of two attesting witnesses, and of his wife, Elizabeth Eeles.

Some considerable time after the execution of the will, the deceased, in the presence of his said wife, cut out of the said will a piece on which was written the word "witnesses," and the names Thomas Wake and John Leng, being the signatures of the attesting witnesses, and at the same time gave as his reason to his wife for having so cut the said will, that he had some idea of altering it and having a new will made. Later on in the same day, the deceased, in the presence of his wife, refastened to the said will the piece he had cut out by plastering pieces of paper at the back thereof, saying, when he replaced the piece of paper, that the will would do for the present, and that if he wanted another one made he could do it afterwards. Application had been made to the registrar of the district registry at York, for probate of the said will, upon the special affidavit of Elizabeth Eeles, and he had transmitted the papers in the case to the principal registry.

1862.
November 4.

In the Goods of THOMAS ELLIS.

Dr. Spinks moved the Court to grant probate of the will to the executors named therein. The testator had given a reason for cutting the piece out of the will, namely, that he was going to make a new will in substitution for it; but he did not do so. He could only have intended to cancel the will conditionally, and not having carried out his intention of making a new will, the old will stands.

SIR C. CRESSWELL: With the consent of the parties interested in case of intestacy, I will grant probate of this will on motion. The nearest case to it I have found is *In the Goods of De Bode*, 5 Notes of Cas. 188. There the testator did something equivalent to what was done by the deceased in this case.

NORRIS *v.* ALLEN.

November 4.

NORRIS *v.* ALLEN.

Probate in solemn Form.—Directions for Trial.—County Court.—Probate Act, 1857, *s.* 59.—*Probate Act*, 1858, *s.* 10.

When the Judge of the Court of Probate is satisfied that the County Court has jurisdiction, he will direct a cause to be tried before the Judge of a County Court having jurisdiction, and will also direct the papers in the cause to be transmitted to the County Court for the purposes of the suit; but he will give no directions as to the mode in which the cause shall be tried.

It will be for the Judge of the County Court to decide whether the cause shall be tried before him with or without a jury.

This was a cause of proving, in solemn form of law, a codicil bearing date the 14th of September, 1861, to the last will and testament of Alice Berry, late of the town of Whittlesey, in the Isle of Ely and county of Cambridge, widow, deceased, who died on the 22nd of April, 1862. The codicil was propounded by Thomas Norris, the plaintiff, as the executor

1862. November 4.

NORRIS v. ALLEN.

named therein, and was opposed by the defendant, who alleged himself to be a legatee named in the will, and pleaded several pleas thereto, upon which issue was joined.

The personal property of the deceased was under the value of £200, and she was not seised of or entitled to any real estate. At the time of her death she had her fixed place of abode at Whittlesey, in the Isle of Ely, and within the jurisdiction of the County Court of Northamptonshire, holden in the city of Peterborough.

Dr. Spinks, for the plaintiff, moved the Court for leave to have the cause tried in the County Court of Northamptonshire, and to order the registrars to have the papers transmitted to the said County Court for that purpose. He also asked for directions as to the mode of trial.

SIR C. CRESSWELL: You should apply to the Judge of the County Court to direct the mode in which the cause is to be tried. I cannot give directions for the cause to be tried in any particular manner. I shall only direct that it be tried before the Judge of the County Court of Northamptonshire, and leave him to decide whether it shall be tried with or without a jury; and I will also direct the papers in the cause to be transmitted to the County Court.

November 11.

HARGREAVES AND OTHERS v. WOOD AND OTHERS.

HARGREAVES AND OTHERS v. WOOD AND OTHERS.

Executors.—Issues tried before Judge of Assize.—Compromise. Rule of Nisi Prius.—Probate.

Where on a trial before a Judge of Assize and a jury of issues relating to the validity of a will, certain executors of which were plaintiffs, and certain other executors of which were defendants in the suit, a

1862.
November 11.

HARGREAVES AND OTHERS v. WOOD AND OTHERS.

verdict was taken by consent for the plaintiffs on an agreement made an order of *nisi prius*, one of the terms of which was that the executors (the defendants) should renounce probate, the Judge of the Court of Probate refused to make the order of *nisi prius* a rule of the Court, on the ground that the Court of Probate could not properly enforce an agreement that any executors of a will should renounce probate thereof, but granted probate to the executors plaintiffs.

The plaintiffs in this case were four of the executors, and had propounded the last will with a codicil thereto of Joseph Hargreaves, deceased, late of Shipley Fields, in the parish of Bradford, in the county of York. The defendants, in opposition to the will, had filed pleas alleging undue execution, undue influence, etc. Upon these pleadings issue had been joined, and the Court directed the questions raised to be tried before the Judge of Assize by a special jury, at the summer assizes, 1862, to be holden in and for the county of York. The question came on for trial before Wilde, B., and a special jury at York, on the 22nd of July, 1862, and a verdict was taken by consent of the plaintiffs and defendants, their counsel and attorneys, upon the terms agreed upon; and an order of *nisi prius* was thereupon made, embodying the said terms, by which it was ordered "that a verdict should be entered for the "plaintiffs; that certain legacies should be paid by one pay-"ment, and not by instalments; that the defendants should "have £300 towards their costs out of the estate; and that "two of the defendants, Joseph Wood and Benjamin Wood, "who were executors of the will, should renounce probate "and disclaim the trusts of the will and codicil." A copy of this order had been served on the defendants.

Mr. Kemplay now moved the Court to direct that the said order of *nisi prius* be entered and made a rule of the Court of Probate, and that probate be granted of the will and codicil to the plaintiffs, as four of the executors named therein.

Mr. Quain appeared for the defendants and assented thereto.

1862. November 11.

HARGREAVES AND OTHERS v. WOOD AND OTHERS.

SIR C. CRESSWELL: By the practice of this Court, there is an objection to granting this motion. I am not aware of any instance in which this Court or the Ecclesiastical Courts have recognized a bargain or agreement made by an executor to renounce probate, and I do not see how I could enforce the agreement against the two defendants.

Mr. Quain: The Court might enforce it by attachment.

SIR C. CRESSWELL: I should have a difficulty in enforcing an agreement to renounce probate. I do not want to make a rule of this Court binding executors to renounce probate. Mr. Kemplay's better course would be to make the order of *nisi prius* a rule of the Court of Common Law from which the writ for trial issued, and he may then come and say that the will has been established, and ask me to grant probate to the four executors. *Primâ facie* any one or more executors appointed in a will, coming in proper form before this Court, are entitled to probate thereof.

Mr. Kemplay: I will alter the form of motion, and will now move for probate of the will and codicil to be granted to the four executors.

SIR C. CRESSWELL: I will decree probate accordingly.

1861. February 20.

In the Goods of JOHN O'BRIEN (deceased), on Motion.

Domiciled Resident in British Guiana.—Local Law.—Administration to Attorney of Administrator-General of Guiana.

In the Goods of JOHN O'BRIEN.

B., having acquired a domicil in British Guiana, died a bachelor and intestate, without any known relations there. Under an ordinance

1861.
February 20.

In the Goods of JOHN O'BRIEN.

of that colony the Administrator-General took possession of B.'s property in that colony, and appointed Messrs. P., F., and P., of Liverpool, to be his attorneys, and in his name to take letters of administration to the personal estate of the deceased in this country.

The Court, after the usual notice to the Queen's Proctor, and citations of next of kin, made the grant accordingly.

In this case, the deceased, John O'Brien, a native of Ireland, had been resident in the colony of British Guiana for about thirty years, and died, domiciled in that colony, in August, 1859, a bachelor and intestate, without any known relations there. By an ordinance of British Guiana of the 24th of May, 1851, reciting that there is an administrator-general for the counties of Demerara, Essequibo, and another for the county of Berbice, it is enacted that each administrator-general shall be, and he is hereby authorized and empowered, for the purposes hereinafter mentioned, to enter upon and take possession of and administer to all estates within his jurisdiction, which shall be then or at any time thereafter unrepresented, and that such unrepresented estates shall be and they are hereby defined to be:—3rdly. The estate and effects of every person who shall die in the colony intestate, and whose heir *ab intestato* shall be unknown, or if known shall be absent without having an attorney or agent in the colony to represent him. 4thly. The estate and effects within the colony of any person dying out of the colony intestate, or whose executors shall be absent from the colony, or, whether absent from or present in the colony, shall refuse or decline to act, or where the estate and effects shall not be taken possession of by the heir of the deceased or by the attorney or agent of such heir.

The deceased left certain property in the colony, and was entitled to personal property in England, consisting of certain bonds of two joint-stock companies, for securing payment of two sums of £600 and £250.

By virtue of the ordinance, Mr. Daly, the Administrator-General of the counties of Demerara and Essequibo, had en-

1861. February 20.

In the Goods of JOHN O'BRIEN.

tered upon the estate of the deceased in the colony, and had appointed Messrs. Parker, Finne, and Parker, of Liverpool, merchants, to be his attorneys, and in his name to take letters of administration in this country to the estate of the deceased.

Dr. Phillimore, Q.C. (*Mr. Westlake* with him), moved the Court to grant letters of administration of the effects in England of the deceased John O'Brien to the attorneys of the Administrator-General. Counsel referred to *The Goods of Beggia*, 1 Add. 340; *Scarth* v. *Bishop of London*, 1 Hagg. 625; *Aspinwall* v. *Queen's Proctor*, 2 Curt. 241, and submitted that though it did not appear that there was any Court in the colony of British Guiana which had power to grant letters of administration in such a case, yet that the Administrator-General was by virtue of the ordinance clothed with a character so like that of a personal representative of a deceased intestate constituted by the Court of the domicil, that this Court would, as usual in such cases, follow the grant in respect of property in this country.

SIR C. CRESSWELL: This motion must at all events stand over for notice to be given to the Queen's Proctor, and for citations of the next of kin to be advertised. My present impression is, that the ordinance referred to is a local law for the protection of unrepresented property in that colony, and does not clothe the Administrator-General with the character of general personal representative of the deceased.

Citation thereupon issued against next of kin, if any, and in March, 1862, *in default of some of the parties cited, and with consent of the only party who appeared, the administration was granted as prayed.*

1862.
Feb. 25.

WELLS v. WELLS.

WELLS v. WELLS.

Plea.—Demurrer.—Practice.

Where a party takes no step on an order to join in demurrer within a given time, the party demurring is at the expiration of the time entitled to judgment on the demurrer.

In this suit the plaintiff propounded a will of Charles Wells as sole executrix. The defendant pleaded several pleas in opposition to the will. One of them was that the executrix was not the lawful child of Charles Wells. To this plea the plaintiff demurred. On the 11th of February, 1862, an order was made that the defendant should join in the demurrer within four days.

Dr. Swabey, for the plaintiff, moved that the plea might be struck out, the defendant having failed to comply with the order.

SIR C. CRESSWELL: The proper course is not to strike out the plea, but to give judgment in your favour upon the demurrer.

April 17.

ISHERWOOD v. CHEETHAM.

ISHERWOOD v. CHEETHAM.

Domicil.—Will.—Declaration.—Demurrer.

Where a declaration propounding a will depends on the due execution according to the law of testator's domicil, it must contain a distinct averment that it was duly executed according to the law of the domicil. An averment that the will was admitted to probate by a competent Court of the alleged domicil is insufficient.

Declaration.—Mehalah Bennett Isherwood, by George White, her attorney, says that Thomas Isherwood Cheetham,

1862. April 17.

ISHERWOOD v. CHEETHAM.

alias Thomas Cheetham Isherwood, formerly of Werneth, in the parish of Stockport, in the county of Chester, deceased, but late of Cincinnati, in the county of Hamilton, and state of Ohio, one of the United States of North America, died on or about the 19th of February, 1842, at Cincinnati aforesaid; that the deceased being then domiciled at Cincinnati aforesaid, and passing by the name of and styling himself Thomas Cheetham Isherwood, made his last will and testament in writing, bearing date the 19th of February, 1842, and in the said will appointed the said Mehalah Bennett Isherwood and Acquilla Ramsey sole executors; that on the 24th of February, 1842, the said will of the deceased, on the part of the executors therein named, was presented to the honourable the then judges of the then Court of Common Pleas at Cincinnati, in the county of Hamilton, and state of Ohio aforesaid, the said court being the competent tribunal in and for the said state of Ohio for determining upon the validity of the said will, and that the said the honourable the judges of the said court did, on the said 24th of February, 1842, by their definitive sentence or decree, pronounce that the said deceased was at the time of executing the said will of sound and disposing mind, memory, and understanding, of full age, and under no undue or lawful restraint, and ordered the said will, being satisfied that it was duly executed according to the law of the said state of Ohio, to be received, and admitted the said will to probate as a good and valid will by the law of the said state for the purpose of passing personal estate. That by virtue of the said definitive sentence or decree of the said Court of Common Pleas of Cincinnati aforesaid, the said will is entitled to be admitted and proved in this honourable court as a good and valid will for passing personal estate situate in England. That the said Mehalah Bennett Isherwood and Acquilla Ramsey accordingly took probate of the said will as the executors named therein, and that the said Acquilla Ramsey afterwards, to wit, in the month of December, 1845, departed this life,

leaving the said Mehalah Bennett Isherwood the sole surviving executor of the said will.

Demurrer.—That the declaration is bad in substance. The grounds of demurrer stated were, that the defendant contends that the validity of the will, according to the law of Ohio, must be distinctly averred, and that the statements respecting the admission of the will to proof apparently without contest, and certainly without the present defendants being party to any contest, cannot be substituted for such an averment, inasmuch as they amount at most to evidence, *valeat quantum*, of the truth of that averment.

Joinder in demurrer.

Dr. Spinks in support of the demurrer: When it is alleged that a testator was domiciled in a certain country, it must also be distinctly alleged that the will was executed according to the law of that country.

Dr. Tristram, contrà: The declaration is sufficient; the deceased died domiciled in Cincinnati, and a competent Court pronounced the will to be valid; if we were to allege the execution according to the law of Ohio, the other side would traverse it.

SIR C. CRESSWELL: The declaration does not allege that the Court of Common Pleas in Cincinnati pronounced their definitive sentence that the will was duly executed. It does not appear that that question was raised before them. Would it have been sufficient if the declaration had alleged that the deceased died domiciled in the state of Ohio, and that by a competent tribunal of that state his will had been admitted to probate?

Dr. Tristram: Yes; probate by a competent Court in Ohio would be conclusive. (*Hare* v. *Nasmyth*, 2 Add. 25; *Larpent*

1862. April 17.

ISHERWOOD v. CHEETHAM.

v. *Sindry*, 1 Hagg. Eccl. 382; *In the Goods of Read*, Ibid. 474; *In the Goods of Cringan*, Ibid. 548; *De Bonneval* v. *De Bonneval*, 1 Curt. 856; *Lanewille* v. *Anderson*, 2 Swab. & Trist. 43; *Price* v. *Dewhurst*, 4 Myl. & Cr. 82.) The object with which the declaration was framed was, to obtain the judgment of this Court before going to trial, upon the question whether the judgment of the Court of Ohio is conclusive evidence of the validity of the will, and binding upon this Court.

SIR C. CRESSWELL: The question is not whether such a judgment is conclusive evidence, but whether it is in a matter of law conclusive upon this Court.

Dr. Tristram: The declaration expressly avers that by virtue of the decree of the Court of Common Pleas of Cincinnati, the will is entitled to probate in this Court.

Dr. Spinks: The cases cited show that the declaration should have averred that the will was executed according to the law of the deceased's domicil.

SIR C. CRESSWELL: The latter part of the averment in the declaration is insufficient.

Dr. Tristram: Does your Lordship hold that you are not bound by the judgment of the Court of Ohio?

SIR C. CRESSWELL: That question is not raised, and I cannot decide a merely speculative question. I am of opinion that the averment in the declaration is insufficient. My judgment is for the demurrer, with leave to amend within a fortnight, on paying costs of demurrer and of previous amendment.

1862.
April 29.

In the Goods of JOB DRINKWATER (deceased).

In the Goods of JOB DRINKWATER.

Limited Grant of Administration.—73rd Section of Probate Act.

A son, being entitled to the whole of the personal estate of his father, deceased intestate, wrote from Madras, where he was serving in the Royal Artillery, to a cousin in England, giving him certain directions as to securing the amount of the property, and transmitting a small sum to him.

The Court granted administration, under the 73rd section of the Probate Act, to the cousin for the use and benefit, etc., limited to carrying into effect the directions contained in the said letter.

Job Drinkwater, late of the parish of Castle Morton, in the county of Worcester, farmer, deceased, died on the 28th of February, 1861, intestate, a widower, leaving him surviving Samuel Drinkwater, his natural and lawful and only child, and the sole person entitled to his personal estate and effects. Samuel Drinkwater was, at the time of the death of his father, a private soldier in the 17th Brigade of Her Majesty's Royal Artillery, stationed at Madras, in the East Indies. The deceased died possessed of certain farming stock, which, shortly after his death, by the direction of his brother Moses Drinkwater, was sold by Messrs. Harper and Son, auctioneers, and the net proceeds of the sale, amounting to £300, remained in the hands of Messrs. Harper and Son. On August the 12th, 1861, Job Wagstaff, a cousin of the deceased, wrote to Samuel Drinkwater, informing him of the death of his father, and of the sale of the farming stock, and that the proceeds of the sale were in the hands of the auctioneer; and in reply received a letter from the said Samuel Drinkwater, which contained the following:—

"As I have now but three years to serve, I think it would "be advisable to serve my time out. . . . In the meantime, "I wish you would take the necessary steps, and lodge the

1862. April 29.

In the Goods of JOB DRINKWATER.

"amount of the estate in the Bank of England in my name, "and send me a receipt for the amount, to enable me to draw "the amount at any time I may require it. I, appointing "you my trustee, if you will be kind enough, will enable "you at any time when I send you authority to draw any "sum I may want, and transmit it to me. If you can send "me a £10 note by the next mail, in a letter, I shall be "glad. Dear cousin, be sure not to forget to enter the "amount in the bank in my own name, Samuel Drinkwater. ". . . I hope Tom will take care of father's watch, and do "the best he can till my return. The bedding can remain "with my uncle, as I do not wish that to be sold, but the "ready money and sale money I hope you will put in the "bank, and, as I said, send me the receipt of the total de-"posited, and an account of any outstanding property."

The value of the deceased's estate was under £450.

Dr. Spinks now moved the Court to grant letters of administration of the personal estate and effects of the deceased to Job Wagstaff, for the use and benefit of the said Samuel Drinkwater, and until he shall apply for and obtain letters of administration to be granted to him.

SIR C. CRESSWELL: I think I may make the grant under section 73 of 20 & 21 Vict. c. 77, but it must be limited in accordance with the directions given by Samuel Drinkwater in his letter. The grant will be limited to receiving the £300 and paying it into the Bank of England in the name of Samuel Drinkwater, with the exception of £10 which he wishes to be remitted to him.

. . .

1862.
May 13.

In the Goods of EDWARD BAYLIS (deceased).

In the Goods of EDWARD BAYLIS.

Intention to appoint Executors.—Bad for Uncertainty.

B., by his will, left all his property to his three sons therein named, and appointed "A. as my executor, with any two of my sons." A. proved the will at the Cape of Good Hope alone, and two of testator's sons now asked for probate of an authentic copy, reserving power to A.

The Court rejected the motion, holding the appointment of "any two of my sons" to be void for uncertainty.

Edward Baylis died on the 12th of September, 1861, at the Cape of Good Hope, having made a will bearing date the 11th of September, 1861, whereby he gave all his property to his three sons therein named, and appointed executors in the words following:—"I hereby appoint Lewis "Alford, Esq., merchant, of Cape Town, to whom I bequeath "ten pounds, as my executor, with any two of my sons." On the 17th of September, 1861, the will was duly proved in the Supreme Court of the Cape of Good Hope by the said Lewis Alford, and an authentic copy or exemplification had been transmitted to this country for the purpose of being proved here. Martin Spencer Baylis and Thomas Hutchinson Baylis, two of the testator's sons, had been sworn as two of the executors. The third son, Arthur Baylis, left England for New Zealand in November, 1855, and in January, 1858, when last heard of, was in Melbourne.

Dr. Spinks now moved that probate of the said will should be granted to Martin Spencer Baylis and Thomas Hutchinson Baylis, as two of the executors appointed by the will, power being reserved for Lewis Alford to come in and obtain probate. He could find no case which is conclusive, but submitted that, as there was no distinctive selection of any two of the testator's sons to act as executor with Lewis Alford,

1862. May 13.

In the Goods of EDWARD BAYLIS.

the testator intended that all his sons should be on the footing of persons who were equally entitled to a grant of administration, so that the two first applying had a right to the grant.

SIR C. CRESSWELL: I am very unwilling to establish a precedent by making such a grant; in some cases it might be of great importance. I am afraid there is that uncertainty about the clause which will prevent my treating it as an appointment.[1] *Motion rejected.*

July 22 & 29.

THE VISCOUNTESS HAWARDEN *v.* DUNLOP.[2]

THE VISCOUNTESS HAWARDEN *v.* DUNLOP.

Will.—Compromise.—Failure to carry out Terms.—Bill in Chancery.—Limited Grant to substantiate Proceedings in Chancery.

D. propounded the will of E., which was opposed by H., one of the next of kin of E., and certain issues in the suit came on for hearing before the Court and a special jury. Before the jury were sworn, certain terms of compromise were signed by counsel on behalf of both parties; one of which terms was that a Scotch confirmation of the will brought into this Court by D. should receive the seal of the Court. (See 21 & 22 Vict. c. 56, s. 12.)

Subsequently, the parties being unable to agree as to the meaning and effect to be given to the terms of compromise, D. moved to have the confirmation sealed and delivered out to him: the Court refused to give effect to one of the terms of the compromise, the parties being unable to agree as to the rest, but held that D. was entitled to take out the confirmation unsealed.

H. then filed a bill in Chancery for administration of E.'s estate, etc.; a demurrer to this bill for want of parties was allowed.

The estate of E. was also alleged to be vested in trustees by a certain sequestration under Scotch Bankruptcy Acts.

[1] See *Edward Altham's Case*, 8 Rep. 155 a; *Strode* v. *Russel*, 2 Vern. 624; 1 Roper on Legacies, 4th ed. 186.

[2] *Ante*, p. 340.

1862.
July 22 & 29.

THE VISCOUNTESS HAWARDEN v. DUNLOP.

H. now moved for administration with the will annexed, *pendente lite*, or for administration limited to substantiate the proceedings in Chancery; and the Court held that the nominee of H. would be entitled to a grant of the latter description.

This was an application to the Court to constitute a personal representative of the estate of the late Baron Elphinstone under the following circumstances:—

The Baron Elphinstone died on the 13th of January, 1861, leaving the plaintiff, the Viscountess Hawarden, and her two sisters his coheiresses-at-law, and his sole next of kin in this country and in Scotland. Upon the death of Baron Elphinstone, Mr. George Dunlop expeded confirmation of his personal estate in Scotland under a trust disposition dated the 13th of February, as the sole disponee named therein.

The Viscountess Hawarden cited Mr. Dunlop to appear in this Court, and to propound the said trust disposition, or to show cause why administration of the personal estate of the deceased should not be granted to her as one of his next of kin. Mr. Dunlop had propounded the trust disposition as the last will of the deceased, to which the Viscountess Hawarden pleaded various pleas, on which issue was joined.

On the 30th of November, the cause came on for trial before the Court and a special jury, when the cause was compromised on the following terms:—

"Terms of agreement, 30th of November, 1861. All contentious proceedings to cease upon the following terms, to "be embodied in the order of the Court:—

"Will to be affirmed. Judge of Probate Court to seal confirmation.

"£22,000 to be paid to Mr. Dunlop, in full of his debts "and all claims. Mr. Dunlop to assign the property carried "by the will to the plaintiff, with warrandice from fact and "deed, and to warrant the plaintiff as to all acts of his "to encumber the estate, or any debts chargeable to the "estate.

1862.
July 22 & 29.

THE VISCOUNTESS HAWARDEN v. DUNLOP.

Dr. Phillimore, Q.C., (*Mr. Everitt* with him,) *contrà*: The course adopted by the plaintiff, both in this Court and in the Court of Chancery, is wholly unnecessary. The real question at issue between the parties is, the construction and validity of the agreement. The plaintiff might and ought to have raised these questions directly, by filing a bill for specific performance: such a suit would have proceeded without a personal representative to the deceased being requisite. Instead of this, she has brought an administration suit, the foundation of which suit is, that she is assignee of the universal legatory of the will of the deceased; and yet she now asks the Court to make a grant to her as one of his next of kin, thereby ignoring the agreement and will. Again, the estate of the deceased has been sequestered under 19 & 20 Vict. c. 79, s. 13, and 20 & 21 Vict. c. 19; and a trustee has been appointed on the petition of the creditors, in whom the personal estate of the deceased is vested.

Mr. Anderson, Q.C., in reply: The objections stated on the other side do not hold against a grant limited to substantiate proceedings in Chancery. *Cur. adv. vult.*

SIR C. CRESSWELL: This was an application for administration with the will annexed of John Fleming, Baron Elphinstone, deceased.

The circumstances under which the application was made were singular. In 1854, Baron Elphinstone executed at Edinburgh a trust disposition and settlement, and thereby nominated and appointed George Dunlop to be his sole executor and universal legatory. On the death of Baron Elphinstone, Dunlop obtained confirmation in Scotland, and then applied to this Court to affix its seal in pursuance of the 21 & 22 Vict. c. 56, s. 12. This was opposed by the present applicant, who in the meantime had instituted proceedings in this Court for the purpose of contesting the validity of the said

1862.
July 22 & 29.

THE VISCOUNTESS HAWARDEN v. DUNLOP.

trust disposition, and under such circumstances the Court refused to order the seal to be affixed. In the suit instituted by Lady Hawarden, Dunlop propounded the trust deed, pleas were pleaded in answer, and issues joined, which came on for trial, when by agreement the suit was compromised on certain terms arranged by counsel, and signed by them, one of which was, that the will should be affirmed, and the confirmation sealed. Dunlop again applied to have the confirmation sealed; but in the meantime disputes had arisen about the meaning and effect of the terms of arrangement, and the Court again, at the instance of Lady Hawarden, refused to order the seal of the Court to be affixed to the confirmation. Lady Hawarden and two others then filed a bill in Chancery, in which, amongst other things, the trust deed making Dunlop sole executor and universal legatee, and the agreement signed by counsel, were set forth, and the bill prayed, first, "That the personal estate "of Baron Elphinstone may be duly administered by and "under the direction of this honourable Court, and that the "share and interest therein of the plaintiff may be ascertained "and duly secured, and that for that purpose all necessary "and proper steps may be taken, directions given, and in-"quiries made;" secondly, for a receiver; thirdly, for an account of the real estate. To this bill the defendant demurred, on two grounds: first, that the bill did not state such a case as entitled them to discovery, nor any equity whereon the Court could ground a decree; secondly, for want of proper parties, there being no duly constituted legal personal representative in England of the testator Baron Elphinstone.

Vice-Chancellor Kindersley, before whom the cause came, having expressed an opinion that the plaintiffs could not proceed without having a duly-constituted legal personal representative of Baron Elphinstone before the Court, Lady Hawarden offered unconditionally to consent that Mr. Dunlop should have the seal of this Court affixed to the confirmation, but he now declines to ask it. Lady Hawarden, as one of the

1862. July 22 & 29.

THE VISCOUNTESS HAWARDEN v. DUNLOP.

next of kin of the testator, asks to have administration with the will annexed, or to have administration limited to substantiating proceedings in equity.

Cause was shown by Dr. Phillimore and Mr. Everitt, who contended that unless the agreement entered into by counsel is valid, and makes Lady Hawarden in equity assignee of the universal legatory or residuary legatee, she can have no right to maintain her suit in equity; that the first step, therefore, for her was to obtain a decree as to the validity and true construction of that agreement, for which purpose a representation to Baron Elphinstone was unnecessary. They relied also on a sequestration granted on the 7th of July last by the Lord Ordinary, under the Bankruptcy Act for Scotland in 1856, and the Bankruptcy and Real Securities Act for Scotland of 1857, as having vested all the property of the deceased in the trustees thereby appointed.

On the other hand, Mr. Anderson did not deny that Lady Hawarden might have filed a bill simply to obtain a decision as to the alleged agreement; but insisted that she had a right to commence an administration suit, relying upon that agreement as the foundation of her right, and that, according to the usual practice, if the party primarily entitled to represent the testator will not take upon himself that character, administration may be granted to the next of kin, or, at all events, a limited administration, for the purpose of enabling her to proceed in equity; and that the proceedings under the Scotch Bankruptcy Act cannot affect that right.

I am of opinion that the plaintiff had a right to raise both questions in the same suit, and that a grant limited to the purposes of the suit should be made, not to herself, but to a nominee; and that such a grant should be made, notwithstanding the sequestration recently granted in Scotland. If that proceeding affects her rights in equity, the Vice-Chancellor will know how to deal with it. In this Court I think I am not affected by it. After this expression of my opinion, Mr.

Dunlop will probably consent to ask that the confirmation may receive the seal of this Court.

1862.
July 22 & 29.

THE VISCOUNTESS HAWARDEN v. DUNLOP

Dr. Phillimore asked for a few days, to consider what course his client should adopt, which was agreed to.

In the Goods of WILLIAM KING (deceased).

November 18.

In the Goods of WILLIAM KING.

Affidavits.—Interlineation.—Description of Widow.—Rule 58, non-contentious Business.

Affidavits were sent out to New Plymouth, New Zealand, to swear the widow of W. K., deceased, as administratrix. In the meantime she had moved to Hobart Town, in Tasmania, and certain interlineations in accordance were made in the affidavit, but not initialed by the judge who administered the oath; the description of Mrs. King, as widow, was also slightly irregular. The Judge made an order that such affidavit should be filed.

In this case William King, of New Plymouth, New Zealand, died in February, 1861, intestate, leaving Eliza Mary King, his lawful widow, him surviving. In the form of affidavit sent out to enable the widow to take out administration in respect of some property in England, she was described as "Eliza Mary King, of New Plymouth, New Zealand, the law-"ful widow and relict of the said deceased." In the meantime, Mrs. King removed to Hobart Town, Tasmania, and there made two affidavits and executed the bond. When the affidavits were returned to England, it was found that the word "late" was interlined before "of New Plymouth," and the words "but now of Hobart Town, in Tasmania," interlined before "the lawful widow and relict;" and such interlineations were not marked with the initials of the judge before whom the oath was sworn, nor noticed in the jurat. A diffi-

1862. November 18.

In the Goods of WILLIAM KING.

culty was felt with respect to their irregularity in the registry; it was also objected that in the above description she was not described as "Eliza Mary King, widow," though she was so described in the heading of the administration bond. The 58th rule, non-contentious business (Principal Registry, 1862), provides that "the registrars are not to allow any affidavit to "be filed, unless by leave of the judge, which is not fairly and "legibly written, or in which there is any interlineation, the "extent of which, at the time when the affidavit was sworn, "is not clearly shown by the initials of the commissioner, or "other person before whom it was sworn."

Dr. Spinks now moved the Court to accept the affidavit, and submitted that the description, as widow, was sufficient.

SIR C. CRESSWELL: I think that I may safely make the order, and that there is a sufficient description of the widow as such.

1859. April 18.

In the Goods of COLONEL GORDON.

In the Goods of COLONEL GORDON (deceased).

Confirmation and Probate Act, 21 & 22 *Vict. c.* 56, *s.* 12.—*Effect of an Eik, or Additional Confirmation, limited to Personal Estate in England.*

An additional confirmation, granted under section 12 of the Confirmation and Probate Act, 1858, does not apply to an original confirmation granted before that Act came into operation.

SEMBLE: an additional confirmation, which does not include personal estate in Scotland besides personal estate in England, is not entitled to be sealed with the seal of the Probate Court under the above section.

Colonel John Gordon, late of Cluny Castle, Aberdeenshire, died on the 10th of July, 1858, at Edinburgh. On the 7th

1859.
April 13.

In the Goods of COLONEL GORDON.

of October, 1858, his executors gave up an inventory of his personal estate in Scotland, amounting to £251,598. 15*s.* 4*d.*, which inventory was recorded in the Commissary Court of Edinburgh, and confirmation of the will was, on the 12th of October, 1858, granted to his executors.

On the 12th of the following month, November, 1858, the Confirmation and Probate Act, 21 & 22 Vict. c. 56, came into operation. By the 12th section of this Act, it is enacted that "from and after the date aforesaid, when any confirma- "tion of the executor of a person, who shall in manner afore- "said be found to have died domiciled in Scotland, which in- "cludes, besides the personal estate situate in Scotland, also "personal estate situate in England, shall be produced in the "principal Court of Probate in England, and a copy thereof "deposited with the Registrar, together with a certified copy "of the interlocutor of the Commissary, finding that such de- "ceased person died domiciled in Scotland, such confirmation "shall be sealed with the seal of the said Court, and returned "to the person producing the same, and shall thereafter have "the like force and effect in England as if a probate or letters "of administration, as the case may be, had been granted by "the said Court of Probate."

On the 27th of December, 1858, the Commissary, by his interlocutor, found that the deceased died domiciled in Scotland, and that it was competent to include in the inventory of his personal estate to be recorded in the Commissary Court any of his personal estate situate in England or in Ireland, or both.

On the 25th of January, 1859, an additional inventory of the personal estate of the deceased was recorded in the Commissary Court of Edinburgh at the instance of the executors, comprising the amount of his personal estate in Scotland contained in the original inventory, and in addition thereto £4210. 1*s.* 2*d.* Consols, and £7759. 6*s.* New Three per Cents. English property.

1859. April 13. On the 27th of January, 1859, the Commissary Court granted to the executors an eik, or additional confirmation.

In the Goods of COLONEL GORDON. The Registrar of the Court of Probate had refused to seal this eik, or additional confirmation, on the ground that the 12th section did not apply to an eik, or additional confirmation.

April 6. *Mr. Anderson*, Q.C., moved the Court on behalf of the executors, to direct that the eik should be sealed. The additional confirmation was a ratification of the appointment of executors, and the additional inventory containing, by reference to the original inventory, personal estate in Scotland as well as in England, the 12th section is applicable. Moreover, the affixing of the seal under this section is a ministerial and not a judicial act of this Court, and it is bound to follow the opinion of the Commissary Court.

SIR C. CRESSWELL: The additional confirmation has no operation upon the property in Scotland. I doubt whether you have any power to engraft a proceeding under this Act on a confirmation, which had been made before this Act came into operation. My present opinion is, that the 12th section does not apply. *Cur. adv. vult.*

SIR C. CRESSWELL: I retain the opinion I expressed, when the motion was made, that I ought not to order the seal of the Court to be affixed to this instrument. The question turns upon the 12th section of the statute. This section made an alteration in the law, which was to take effect after the 12th of November, 1858; and of course the original confirmation, which was granted previous to that date, is not within its operation. It appears to me, that the additional confirmation does not come within the terms of the Act, because it does not include personal estate in Scotland besides the personal estate in England. All the personal estate in Scotland had been previously confirmed by the original grant. This Act

cannot have a retrospective operation. It was contended that I ought to act ministerially; but I think I am bound to act upon my own opinion, whether the statute is applicable or not; and being of opinion that it is not applicable, I cannot order the Registrar to affix the seal of the Court.

1859. April 13.

In the Goods of Colonel Gordon.

Motion rejected.

Mr. Anderson: The executors will take probate in common form.

In the Goods of Andrew Wingate (deceased).

1861. December 3.

In the Goods of Andrew Wingate.

Confirmation and Probate Act (1858), 21 & 22 *Vict. c.* 56, *ss.* 9, 12.—*Eik, or Additional Confirmation.—Seal of Court.*

Where an inventory has been recorded in a Commissary Court of Scotland of the personal estate of a person who died domiciled in Scotland, and confirmation has been granted in respect of the same, and afterwards an additional inventory has been recorded of personal estate belonging to the deceased in England, and an eik, or additional confirmation, has been granted in respect of the same, the Court of Probate will not seal such eik, or additional confirmation.

Andrew Wingate, a merchant of Glasgow, died on the 23rd of June, 1860.

He executed a deed of settlement, dated the 15th of July, 1857, of which he appointed the Rev. William Wingate, George Wingate, and Andrew Wingate, junior, executors. On the 1st of September, 1860, this deed of settlement was duly recorded in the Court Books of the Commissary of the county of Lanark, in Scotland, and the executors gave up, on oath, an inventory of the deceased's personal estate situate in Scotland, amounting to £9074. 13*s.* 8*d.*, which inventory had also been recorded in the said Court Books on the same day; and on the 4th of September, 1860, the Commissary of

1861. December 3. Lanark granted confirmation of the appointment of the said executors.

In the Goods of ANDREW WINGATE.

Subsequently to the confirmation, it was discovered that there were certain shares in the Church of England Insurance Company standing in the deceased's name, and which shares he held as a trustee.

On the 17th of October, 1861, an additional inventory of the personal estate of the deceased was recorded on the part of the executors in the Commissary Court of Lanark, in which, after reciting the death of the deceased and the execution of the deed of settlement, and that the same had been recorded in the Commissary Court of Lanark, it was as follows:—

"Amount of the estate wheresoever "situated, given up in the inventory "recorded in the Commissary Court "Books of Lanarkshire, on the 1st "day of September, 1860 . . .	£9074	13	8
"Effects omitted, England:—			
"Fifty shares in the Church of England "Insurance Institution, held by the "deceased as trustee, with dividends	£186	11	0
"*Note.*—Amount of estate situate in "England and Scotland	£9261	4	8
"*Note.*—The inventory duty on the "total estate, wheresoever situate, is	£180	0	0
"The duty paid on the former inven- "tory	£180	0	0

"There is therefore no duty on additional inventory."

On the 18th of October, 1861, the Commissary of Lanark, by a confirmation, after reciting the death of the deceased, and that his executors nominate under the said deed of settlement, had given up an inventory of his personal estate and effects, and had expeded a Testamenta on the 4th of September,

1860, and had since given up on oath an additional inventory of the personal estate of the deceased situate in England, amounting to £186. 11*s.* 11*d.*, and that the additional inventory had been recorded in his Court Books on the 17th of October, 1861, he thereby confirmed the nomination of executors contained in the aforesaid deed of settlement, and gave and committed to them full power to receive, administer, and dispose of the said personal estate and effects contained in the aforesaid additional inventory, and to grant discharges for the same.

1861. December 3.

In the Goods of ANDREW WINGATE.

Application had been made at the Principal Registry that the eik, or additional confirmation, should be sealed under 21 & 22 Vict. c. 56; but the Registrar had refused to seal it, on the ground that the statute did not apply to an eik, or additional confirmation.

Dr. Tristram moved the Court to direct, that the eik, or additional confirmation, should be sealed with the seal of the Court. He was aware that there was a decision of the Court, *In the Goods of Colonel John Gordon, deceased,* which had been relied on in the Registry, as an authority for refusing to seal the eik. In that case, however, the original confirmation was granted before, and the additional confirmation was granted after the Confirmation and Probate Act, 21 & 22 Vict. c. 56, had come into operation, which might distinguish it from the present case. The interpretation put by the Commissary Court of Scotland and by the authority of this Court on the Act would be in conflict, if the motion was rejected. By the 9th section of the Act, the executors were entitled to include in the inventory of the deceased's personal estate personal property situate in England as well as in Scotland. By the 10th section, confirmation was to be granted in the form, or as nearly as may be in the form, of the schedule annexed; and by the 12th section, any confirmation of the executor of a person found to have died domiciled in Scotland,

1861. December 3.

In the Goods of ANDREW WINGATE.

including personal estate in England as well as in Scotland, upon its production in the Court of Probate, was entitled to have the seal of the Court affixed to it. The first inventory was incomplete; the further or supplementary inventory had been brought in to make it complete; and he submitted that the two inventories were, to all intents and purposes, to be taken as one inventory. If the original and additional inventory were to be treated as one inventory, then the original and additional confirmation would be taken as one confirmation, and the 12th section would apply. The real question was, what was the true interpretation of the word eik; and according to the practice of the Commissary Courts of Scotland, it was considered to be equivalent to the confirmation referred to in the 12th section.

SIR C. CRESSWELL: I think this case must be governed by the decision I gave in *The Goods of Colonel John Gordon, deceased.* The eik, or additional confirmation, does not, in my opinion, come within the terms of the 12th section, because it does not confirm the executors in respect of personal estate situate in Scotland, but only in respect of personal estate situate in England. If it is desired that I should treat these additional confirmations as a confirmation referred to in the 12th section, the form of them should be altered.

1862. Jan. 14 and 21.

In the Goods of ALEXANDER PILE.

In the Goods of ALEXANDER PILE (deceased).

Administration with Will and Codicil annexed.—Construction. Residuary Estate.—Tenancy in Common.—Lapse to undisposed Residue.

A. by his will bequeathed the residue of his personal estate to be equally disposed of between five of his children, whom he named. One of those children died in A.'s lifetime.

1862.

Jan. 14 and 21.

In the Goods of ALEXANDER PILE.

The Court held that the five children took as the tenants in common, and the share of the deceased child therefore lapsed to the undisposed residue, and granted administration with the will and codicil annexed to B., son of the deceased, not as a legatee, but as entitled as one of his next of kin to part of the undisposed residue.

Alexander Pile died on the 24th of August, 1832, having made and duly executed his last will and testament, dated the 9th of April, 1831, with a codicil thereto, dated the 10th of April, 1831, and by his will appointed his wife, Harriett Pile, his sole executrix; and he gave her all his copyhold and leasehold premises, goods and chattels for her life, and after her death bequeathed "what goods or chattels remained, to be "equally disposed of amongst his children, viz. Harriett Pile, "John Pile, Mary Pile, Ann Chedzoy, and Hester Pile." He also left to his son, Samuel Pile, after the death of his wife, a malt and mill-house and houses. Ann Chedzoy died in the lifetime of the testator, and Harriett Pile, Mary Pile, and Hester Pile survived him, but had all since died intestate, leaving John Pile, the surviving residuary legatee, substituted. Harriett Pile, the executrix, died on the 16th of January, 1841, without having proved the deceased's will, and no representation had hitherto been taken out to his personal estate.

John Pile had been cited by Samuel Pile, as one of the natural and lawful children of the deceased and a legatee named in the said will, to accept or refuse administration with the said will and codicil annexed, or to show cause why the same should not be granted to the said Samuel Pile as such legatee, but John Pile had entered no appearance thereto.

The notice of motion filed was in accordance with the terms of the citation.

Dr. Tristram appeared for Samuel Pile.

1862. Jan. 14 and 21.

In the Goods of ALEXANDER PILE.

SIR C. CRESSWELL: There is a preliminary objection to my granting the motion according to the terms of the notice of motion filed. The only property given to Samuel Pile may, for anything that appears, be copyhold or freehold. To entitle you to the motion, there should be an affidavit showing that it was leasehold.

Dr. Tristram: There was certainly that objection to the motion as worded. But he submitted that the grant ought to go to Samuel Pile, not as a legatee, but under a superior title, viz. as one of the next of kin of the deceased, and as such entitled to share in his undisposed residuary estate. The one-fifth share of the residuary personal estate given to Ann Chedzoy, provided it were given to her as tenant in common, would lapse by her death in the testator's lifetime and fall into his undisposed residuary estate. The words of gift were, "what goods or chattels remain after my wife's "death to be equally disposed of amongst my children" (the five before named); and the rule of construction was, that where a residue is given to more persons than one by any mode of expression that denotes a severance, they take as tenants in common. The words, "to be equally disposed of "amongst my children," clearly denoted such a severance as to create a tenancy in common between them. (2 Wms. on Exors. 5th ed. 1317.) And the rule was, that where a residuary bequest is made to several persons as tenants in common, and one of them dies in the testator's lifetime, his share did not pass to the survivors, but was treated as undisposed residue. (2 Wms. on Exors. 5th ed. 1315.) Upon the *dicta* cited, he submitted that the grant should go to Samuel Pile, as one of the next of kin of the deceased, and as such entitled to share in the undisposed residue of his personal estate; and he moved accordingly.

SIR C. CRESSWELL: The question of construction is not

free from difficulty, and there are cases referred to by Williams, J., which may go against the construction you contend for. I will look into these cases before deciding the question of construction. *Cur. adv. vult.*

1862. Jan. 14 and 21. In the Goods of ALEXANDER PILE.

SIR C. CRESSWELL: I have looked at the cases referred to by Williams, J., and I think the construction put upon the residuary clause by Dr. Tristram is correct. I will, therefore, direct the grant to go to Samuel Pile as one of the next of kin of the deceased entitled to share in the undisposed residue of his personal property.

January 21.

June 24.

In the Goods of LOUISA MARIA DE LA FARQUE.

In the Goods of LOUISA MARIA DE LA FARQUE, widow, (deceased).

Administration Bond.—Sureties dispensed with.—Probate Act, sect. 82.

The Court made an order to dispense with the usual sureties to an administration bond, to be entered into by A. B., who was beneficially entitled to a fund which had been paid into the Court of Chancery, and for which the administration was required, it appearing that A. B. was, in consequence of sickness, in great poverty, and unable to induce any of his relatives or friends to become sureties to the bond.

Louisa Maria de la Farque, of Ipswich, died on the 24th of November, 1833, a widow, having made her last will, dated the 20th of November, 1833, whereby she bequeathed all her residuary estate to her executors Robert Garrod and Edward Davers, upon trust for her three sons, William James de la Farque, George A. de la Farque, and Charles H. de la Farque. On the 7th of February, 1834, Edward Davers alone proved

1862. June 24.

In the Goods of LOUISA MARIA DE LA FARQUE.

the said will in the Prerogative Court of Canterbury, and died in 1853, leaving a will, of which he appointed no executor, and the said Robert Garrod him surviving.

On the 12th of November, 1858, the said Robert Garrod duly renounced the executorship of the deceased's will.

The deceased, under the limitations of her father's will, was, at the time of her death, entitled to one-fifth share of £791. 17*s.* New Three per Cent. Bank Annuities, and £332. 8*s.* 5*d.* cash, which was now standing in the name of the Accountant-General of the Court of Chancery.

William James de la Farque (the eldest son of the deceased) was in a state of great poverty, and, in consequence of ill-health, of no fixed occupation, and at times dependent for subsistence upon private charity; one of his two brothers died many years ago intestate and unmarried, and the other had not been heard of for about twenty-five years, and was believed not to have been married.

Under these circumstances, William James de la Farque claimed to be entitled to the whole of his mother's one-fifth share in the above funds—namely, to one-third in his own right and to the remaining two-thirds as sole next of kin of his brothers—and was about to petition the Court of Chancery for the payment to him of the same, but was advised by his Chancery counsel that, previous to filing his petition, he ought to obtain letters of administration *de bonis non* with the deceased's will annexed.

He had, however, no relatives or friends who were willing to become sureties to the administration bond.

Dr. Spinks, upon the joint affidavit of the said William James de la Farque, and Mr. H. A. Maude, his solicitor, verifying the above facts, moved the Court for an order to dispense with the usual sureties to the bond to be entered into by the said William James de la Farque, upon his obtaining his grant of letters of administration *de bonis non* with

the deceased's will annexed. (Court of Probate Act, 1857, s. 82.)

1862. June 24.

In the Goods of LOUISA MARIA DE LA FARQUE.

SIR C. CRESSWELL declined granting the motion without some further account of the brothers of William James de la Farque, so as more clearly to show that the applicant was entitled in his own right to the whole fund.

Dr. Spinks renewed the above motion. There was a further affidavit of William James de la Farque filed, stating that his brother George Augustus de la Farque entered the British navy as a seaman in 1837; that the ship to which he was attached was shortly afterwards ordered to the South African station; that he died while so stationed there, a bachelor and intestate; that he had been informed that his brother Charles H. de la Farque, about the year 1840, sailed on a smuggling expedition, that he was last seen by an old schoolfellow about the year 1841, at the Cape of Good Hope, and that he had never since been seen or heard of, and that he had never heard of his being married or having made a will. A further affidavit of Mr. Maude, his solicitor, had also been filed, stating that on inquiry at Somerset House, he had been informed that it appeared by the register that a person of the name of George Augustus de la Farque, who was born at Ipswich, had entered the British navy in October, 1837, and had died on board her Majesty's ship 'Bonetta,' in February, 1838, off the Island of Ascension. A certificate of his death was annexed.

SIR C. CRESSWELL, on this further information, granted the motion.

1861.
November 5.

In the Goods of JAMES BROWNING (deceased).

In the Goods of JAMES BROWNING.

Administration.—21 *Hen. VIII. c.* 5, *s.* 3.—*Joint Grant to a Widow and to a Person entitled in Distribution refused.*—*Probate Act, s.* 73.

The Court is precluded by 21 Hen. VIII. c. 5, s. 3, from making a joint grant of administration to a widow and one of the persons entitled in distribution, even with the consent of the next of kin and of all the other persons entitled in distribution; and the 73rd section of the Probate Court Act does not enlarge the power of the Court in such a case.

James Browning died in April, 1861, intestate, leaving Frances Browning his widow, Mary Ann Grace his sister and only next of kin, and six nephews and five nieces, the only persons entitled in distribution of his personal estate and effects. The deceased, who was senior partner in a firm carrying on business as merchants, in which some of the nephews above mentioned were also partners, left personal property of the value of £110,000. Shortly after the death of the deceased, a caveat was entered in the principal registry on behalf of James Browning, one of the nephews, but an arrangement was afterwards come to between Mrs. Browning, the widow, and his nephews and nieces, that the caveat should be withdrawn, and that in consideration of the large amount of the estate, an application should be made to the Court, with the necessary consents, for a grant of administration to be decreed to Mrs. Browning, the widow, and to Mr. James Browning, one of the nephews, Mr. Henry and Mr. William Browning, two other nephews and partners, consenting, on the grant being made, to execute the administration bond as sureties. Consents to a joint grant being so made were filed on behalf of Mrs. Grace, the deceased's sister, and all the nephews and nieces. An affidavit of Mrs. Browning, the widow, was also filed in support of the motion.

1861.
November 5.

In the Goods of JAMES BROWNING.

Dr. Phillimore, Q.C. (*Dr. Tristram* with him), moved "for "a joint grant of the personal effects of the deceased to be "decreed to Mrs. Browning, the widow, and Mr. James Brown- "ing, the natural and lawful nephew, and one of the persons "entitled in distribution to the effects of the deceased." The 21 Hen. VIII. c. 5, s. 3, directs the ordinary in case of intestacy to grant administration "to the widow of the same "person deceased, or to his next of kin, or to both, as by the "discretion of the same ordinary shall be thought good." And the 31 Edw. III. c. 11, directs the ordinary to depute the next and most lawful friends of the dead person intestate to administer his goods. The statute of Henry VIII. ought not to be construed so as to restrain the discretion of the ordinary from including in the grant a person entitled in distribution with the consent of all the parties interested. If the widow and sister were not to take the grant, it would go to the nephew on his applying for it. Why should he not be joined in it with the consent of all parties? The property is of large amount, a great part of it is employed in the business of the firm, and it is considered by all persons interested, that Mrs. Browning should have a person accustomed to the transaction of business joined with her in the administration. Even if the Court feel itself precluded by the statute of Henry VIII., there are, it is submitted, special circumstances which would bring the application within the terms of the 73rd section of the Probate Act.

SIR C. CRESSWELL: If I am to make a joint grant of administration at all, it must be to the widow and to the sister, as the next of kin of the deceased. I am of opinion that the statute 21 Hen. VIII. c. 5, s. 3, precludes me from joining the nephew, who is only a person entitled in distribution, and not next of kin of the deceased, in the grant. Neither can I make the grant under section 73 of the Probate Act.

CASES

IN THE

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

1862.
May 6.

SERRELL
v.
SERRELL AND BAMFORD.

SERRELL *v.* SERRELL and BAMFORD.

Decree nisi.—*Affidavit of Search within Three Calendar Months.—Practice.*

Where affidavits in support of a motion omit to state material facts, which facts existed at the date when the affidavit was made, the Court may allow such motion to stand over.

But where a motion cannot be granted by reason of the non-existence at the date of the affidavit of material facts, such motion must be rejected.

Dr. Swabey moved the Court to make absolute a decree *nisi* for dissolution of marriage, which had been pronounced on the 30th of January, 1862, upon an affidavit in the usual form, which stated that search had been made on the 30th of April in the book kept in the registry for entering appearances, and that no person wishing to show cause against the decree being made absolute had then entered an appearance, and that the Queen's Proctor had not applied for leave to intervene.

THE JUDGE ORDINARY: I cannot grant the motion. The search in the registry was made a day too soon. Under the 23 & 24 Vict. c. 144, s. 7, any person may show cause against

1862.
May 6.

SERRELL
v.
SERRELL AND BAMFORD.

the decree being made absolute at any time during three months (*i. e.* calendar months) from the pronouncing the decree. The motion must be rejected.

Dr. Swabey asked that the motion might not be rejected, but allowed to stand over.

THE JUDGE ORDINARY said that he was generally willing to allow motions to stand over which he could not grant upon the affidavits before him, in consequence of their omitting to state material facts, if those facts really existed; but that here the motion could not be granted upon the state of facts which existed at the time the affidavit was made, and there must be a fresh search for an appearance; there must therefore be a fresh motion.

May 6.

NICHOLLS
v.
NICHOLLS.

NICHOLLS *v.* NICHOLLS.

Order for Payment of Taxed Costs.—Personal Service.—Practice.

When an order for payment of a sum of money within a specified time is made, and personally served, a personal demand for payment is unnecessary to found a motion for attachment for disobedience to the order.

This was originally the wife's petition. On the 22nd of May, 1861, an order had been made that the respondent should, within one week from the service of the order upon him, pay to the petitioner, or her solicitors, Messrs. Deane, Chubb, and Saunders, £22. 0*s.* 1*d.*, the amount of her taxed costs. On the 31st of May, 1861, this order was personally served on the respondent, but he had failed to obey it.

Dr. Spinks now moved for an attachment.

1862.
May 6.

NICHOLLS
v.
NICHOLLS.

Dr. Wambey, contrà: The affidavits on which the motion is founded do not state that there has been a personal demand of payment. From *Thomas* v. *Thomas, ante*, p. 64, it would appear that a personal demand was usually made.

THE JUDGE ORDINARY: I think when the order is to pay within a specified time, that a personal demand is unnecessary. When I first presided in this Court I acted in accordance with the practice of the courts of Common Law, and thought that a personal demand was necessary. In those courts, to obtain an attachment for non-payment of costs, it is requisite that a copy of the rule, with the Master's allocatur thereon, be personally served, and at the same time a personal demand made. I shall grant an attachment, but it may lie in the registry for a week.

Dr. Spinks: In this Court the practice of the Court of Chancery is followed. Under the new orders of the Court of Chancery a demand is unnecessary.

May 6.

BOULTON
v.
BOULTON AND PAGE
(Her Majesty's Proctor intervening).

BOULTON *v.* BOULTON and PAGE (Her Majesty's Proctor intervening).

Husband's Petition for Dissolution.—Decree nisi.—*Queen's Proctor's Intervention.—Reversal.—Costs.*

B. petitioned for dissolution by reason of his wife's adultery, and on proof of this allegation, neither respondent appearing, obtained a decree *nisi*. On motion to make the decree absolute, an affidavit of the respondent charging B. with bigamy was before the Court, who directed it to be laid before the Queen's Proctor. The Queen's Proctor intervened and pleaded collusion, and the bigamy and subsequent adultery of B. B. replied, denying the collusion, but admitting the bigamy and adultery.

1862.
May 6.

BOULTON
v.
BOULTON AND PAGE
(Her Majesty's Proctor intervening).

The Court, on motion on behalf of Queen's Proctor, reversed the decree *nisi*, dismissed the petition, and condemned B. in the costs of the Queen's Proctor's intervention.

This was the husband's petition for dissolution of marriage, to which neither of the respondents appeared.

On the 31st of May, 1861, a decree *nisi* was pronounced.

On the 22nd of January, 1862, the Queen's Proctor, in consequence of information (see *ante*, p. 405) which had been laid before him by order of the Court, applied for and obtained leave to intervene and show cause against the decree *nisi* being made absolute, and on the 27th of January, 1862, he filed pleas, in which he alleged that the petitioner and respondent had been acting in collusion for the purpose of obtaining a divorce, contrary to the justice of the case, and with that intent kept from the knowledge of the Court till after the decree *nisi* had been pronounced, the following material facts, viz.:—1. That the petitioner who had been lawfully married to the respondent on the 27th of May, 1839, was in fact married on the 29th of January, 1847, to Eleanor Ravenhill, the respondent being still living. 2. That he afterwards cohabited with and committed adultery with the said Eleanor Ravenhill until her death in October, 1859. 3. That the petitioner by his said conduct had conduced to the adultery of the respondent.

On the 15th of February the petitioner filed a replication, in which he denied that he had been acting in collusion with the respondent; admitted the bigamy and adultery charged by the Queen's Proctor; denied that he had, by his conduct, conduced to the adultery of the respondent; and alleged that before he married Eleanor Ravenhill, he, in July, 1846, detected the respondent in the act of committing adultery, and that he immediately sent her to her mother, and had never afterwards had any connection with her.

Dr. Spinks now moved, that, as sufficient of the facts

1862. May 6.

BOULTON v. BOULTON AND PAGE (Her Majesty's Proctor intervening).

pleaded by the Queen's Proctor, were admitted by the petitioner, the Court should reverse the decree *nisi*, dismiss the petition, and condemn the petitioner in the costs incurred by the Queen's Proctor.

Mr. A. S. Hill, contrà, urged that the conduct of the wife, who had been, and still was, living in open adultery, ought to be taken into consideration, and that the petitioner should not be condemned in costs.

THE JUDGE ORDINARY: A man guilty of bigamy, who sues for a divorce, must take the risk of the Queen's Proctor intervening; I have nothing to do with the conduct of the wife, it is the conduct of the husband that I have to deal with. The decree must be reversed, the petition dismissed, and the petitioner condemned in the costs of the intervention.

January 14.

SEDDON v. SEDDON AND DOYLE.

SEDDON v. SEDDON AND DOYLE.

Petition for Dissolution.—Petitioner's Adultery.—Dismissal of Parties.—Custody of Children.—Costs.

A jury found the respondent guilty of adultery; petitioner guilty of conduct conducing to his wife's adultery and of adultery, and assessed the damages at a farthing.

The Court dismissed all parties, condemned the petitioner in respondent's costs, made no order as to costs between petitioner and co-respondent, and refused, even if it had the power under such circumstances, to make an order giving the respondent the custody of or access to the children.

This was a petition by a husband for dissolution of marriage, claiming £3000 damages against the co-respondent. The

respondent and co-respondent denied the adultery. The co-respondent also pleaded that the petitioner by his wilful neglect of the respondent, and by his misconduct towards her, and by his profligate and dissipated habits, had conduced to her adultery, and that he also had been guilty of adultery.

The issues raised by these pleas were, in December, 1861, tried before the Judge Ordinary by a jury, who found that the respondent had been guilty of adultery with the co-respondent, and that the petitioner had been guilty of wilful neglect and misconduct conducing to the adultery, and that he had also been guilty of adultery. They assessed the damages against the co-respondent at one farthing.

Dr. Phillimore, Q.C., for the petitioner, now moved the Court for judgment upon this verdict; and also that an order allowing the respondent to have access to the children of the marriage *pendente lite* should be rescinded if it did not cease to operate upon judgment being pronounced; and that the co-respondent should be condemned in costs.

Mr. Hannen (for the respondent): That in the decree dismissing the petition an order giving the respondent access to her children should be inserted.

THE JUDGE ORDINARY: If I dismiss the parties, I make no decree, and have no power to make any order with respect to the children. As to them, the parties must have recourse to the Courts of Law or Equity.

Mr. Hawkins, Q.C., for the co-respondent, opposed the motion that he should be condemned in costs.

THE JUDGE ORDINARY: The petitioner has come before the Court in a most unfavourable character. His conduct towards the unfortunate respondent was most heartless. Jealous

1862. January 14.

SEDDON v. SEDDON AND DOYLE.

by nature, that unhappy woman had her jealousy constantly kept alive by her husband, and at last threw herself into the arms of her seducer. She must take the consequence of her conduct. It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this Court is concerned, all right to the custody of, or access to her children. Even if I possessed the power (which I think I do not) to make an order giving the respondent access to her children, in such a case I should not make one.

As to costs, the petitioner has failed in his suit, and is therefore not entitled to costs from the co-respondent. I shall therefore dismiss all parties from the suit, and order the petitioner to pay the respondent's costs; but, as between the petitioner and the co-respondent, there will be no order as to costs.

April 29.

SHAW v. SHAW.

SHAW *v.* SHAW.

Delivery or Inspection of Papers.—Commission to examine Witnesses.—Practice.

The wife, petitioning for judicial separation on the ground of cruelty, moved for an order on the husband to deliver to the petitioner, or her attorney, certain documents and papers alleged to have been taken from the petitioner by the husband, and to be material to the conduct of her petition, especially to enable her to comply with an order of the Court for particulars of dates, etc. The husband objected to give up the papers, but was willing to allow copies to be taken.

The Court ordered the papers to be produced by the respondent's attorney to petitioner's attorney, the latter to be at liberty to take copies, and reserved the question of costs of the motion; no application having been made to the husband before notice of motion given.

Before issue joined, an application for commission to examine witnesses is premature.

1862.
April 22.

SHAW
v.
SHAW.

This was the wife's petition for judicial separation on the ground of cruelty. Issue had not yet been joined.

Mr. H. Bullar, on behalf of the petitioner, now moved the Court first to order the respondent within one week to deliver to the petitioner, or her solicitors, certain portions of a pocket diary kept by the petitioner, and containing entries from the month of April to the month of May, 1859, which were alleged to have been torn by the respondent from the said diary, and also a diary for the year 1861, together with certain letters, papers, and memoranda in the handwriting of, or belonging to the petitioner, which the respondent took away from the petitioner's lodgings, or that the petitioner's solicitors be permitted to inspect and take copies of the same respectively; and also to order that, if the same are not delivered, or such inspection and copying permitted within the time specified, that the order of the Court of the 4th of March, 1862, directing the petitioner to give particulars of dates, etc., be rescinded. Secondly, to order a commission to issue directed to her Majesty's Consul or Vice-Consul at Paris, to take the evidence of Ulysse Gosse, a witness on behalf of the petitioner.

The first motion was founded upon an affidavit of the petitioner, in which she stated that in October, 1859, she was staying with the respondent at Brighton; that the respondent suddenly left her and went to his residence, Western Lodge, Hammersmith; that he then unlocked and broke open her closets, writing-table, drawers and wardrobe, and took out, amongst other things, a pocket diary, in which short references had been made by the petitioner at different times between May and October, 1859, of acts of cruelty and misconduct of the respondent towards her; that the respondent afterwards re-

1862. April 29. SHAW v. SHAW.

turned the diary, stating that he had taken out several of the leaves; that in May, 1861, the petitioner, having ceased to live with the respondent, resided at Clifton in concealment from him, when he entered the house in which she was residing, and broke open her boxes and took therefrom another pocket diary and letters, memoranda and other papers; that the said diary, papers, etc., contained entries made by the petitioner of the respondent's conduct towards her, and which entries would enable her to comply with the order of the 4th of March, and were also necessary and material to her in prosecuting the suit, and that without them she was unable to give further particulars. Other affidavits were also filed, corroborating some of the above statements.

In support of the motion for a commission an affidavit of the petitioner's solicitor was filed, stating that Ulysse Gosse was a necessary witness that he was residing at Paris, and that there was no reason for believing that he would come within the jurisdiction of the Court in time to be served with a subpœna to attend and give evidence at the hearing.

Mr. H. Bullar: This Court possesses the same equitable jurisdiction as the Common Law Courts to order the inspection of a document in the possession of a party to the suit for the purpose of the other party framing his pleading or supporting his suit or defence. It appears from the affidavit of the petitioner that she is unable to comply with the order of the Court to give further particulars of the acts of cruelty without the papers she asks for. He also asked for a commission.

Mr. J. B. Karslake, Q.C., *contrà:* I do not intend to raise the question whether this Court has jurisdiction to order the production of the documents. The respondent complains that no application was made to him for these papers until he received notice of the motion. The respondent is willing to

allow the petitioner to take copies of the papers, but she certainly is not entitled to have them given up, as they are the respondent's property. The application for a commission should not be granted until the issues to be tried have been raised.

1862. April 29.

SHAW v. SHAW.

THE JUDGE ORDINARY: I think it will be sufficient if the papers are produced for inspection. I order that they be produced by the respondent's attorney to the petitioner's attorney, who is to be at liberty to take copies of them. The question as to the petitioner's right to the costs of the motion must be reserved. As to the second motion, until the issues to be tried have been raised, an application for a commission to examine witnesses is premature.

DICKENS *v.* DICKENS.

July 15 and 22.

DICKENS v. DICKENS.

Order to pay Alimony.—Attachment.—Order of Discharge in Bankruptcy.—Sequestration.—24 & 25 *Vict. c.* 184, *ss.* 149, 161, *and* 165.

An order of discharge under the Bankruptcy Act, 1861, protects the bankrupt from any proceeding to enforce payment of alimony, in respect of which he has been attached before the order of discharge.

A rule to show cause why sequestration should not issue against his estate was therefore discharged.

This was originally the wife's petition for judicial separation, and permanent alimony was allotted. An attachment had issued against the respondent for non-payment of arrears of such alimony. He subsequently, on the 25th of March, 1862, obtained his order of discharge under the 24 & 25 Vict. c. 184.

1862.
July 15 and 22.

DICKENS
v.
DICKENS.

Mr. Aspland, on behalf of the petitioner, obtained a rule *nisi* for a sequestration against the estate of the respondent in respect of the arrears of alimony.

Mr. Hannen showed cause against the sequestration issuing; and

Mr. Aspland argued in support of the rule.

The facts and authorities cited are sufficiently stated in the judgment. *Cur. adv. vult.*

THE JUDGE ORDINARY: In this case a decree was pronounced for judicial separation on the 26th of July, 1859, and on the 1st of July, 1860, permanent alimony was allotted to the petitioner at the rate of £60 per annum. On the 30th of July, 1861, an attachment issued against the respondent for £75 arrears of alimony up to the 26th of October, 1860. On the 14th of January, 1862, an attachment issued against the respondent for non-payment of £153. 11*s.* 5*d.* taxed costs, and £60 arrears of alimony. On the 24th of January, 1862, the respondent was brought up by *habeas corpus*, and charged in execution for those sums. On the 22nd of January, 1862, the respondent filed his petition in the Court of Bankruptcy, and in his account filed under that petition the sums above mentioned were included. On the 25th of March an order was made by a commissioner in bankruptcy for his discharge. On the 1st of July, an order *nisi* for a sequestration for arrears of alimony was granted, against which Mr. Hannen showed cause, and contended that the discharge granted under the Bankruptcy Act of last year protected the respondent from any such process. He relied on the effect of sections 149, 161, and 165. On the other hand, it was contended that the discharge under the 165th section did not extend to alimony, although the words are general, for that alimony has always been considered

1862.
July 15 and 22.

DICKENS
v.
DICKENS.

as something different from other demands, the payment of which can neither be enforced nor discharged as other debts, for which the case of *Stones* v. *Corke*, 7 Sim. 22, and 8 Sim. 321, in note, was cited.

But it seems to me that the question is not affected by that decision. That was an application to a Court of Equity by the executors of a married woman to enforce payment after her death of arrears of alimony due when she died; that application was made on the ground that after her death the Ecclesiastical Court would not enforce the payment. The decision appears to have proceeded on the ground that the matter was of ecclesiastical conusance, and as the Ecclesiastical Court would not enforce payment under such circumstances the Court of Chancery had no such jurisdiction. The question therefore is not affected by authority, and I must endeavour to construe correctly the enactment of the Legislature, and give effect to it. Now, by section 149 of the 24 & 25 Vict. c. 134, a person entitled to enforce against the bankrupt payment of any money, costs, or expenses, by process of contempt issuing out of any Court, shall be entitled to come in as a creditor under the bankruptcy and prove for the amount payable under the process. The wife in this case was a person entitled to enforce against the respondent payment of money by process of contempt issuing out of this Court, and as this Court was in existence before the Act passed, I cannot doubt that it was included in the expression, "any Court." By section 161 it was enacted that "the order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands proveable under his bankruptcy." This demand was so proveable. By section 165, "the order of discharge shall discharge the bankrupt from the effects of any process issuing out of any Court for contempt of any Court for non-payment of money, and from all costs that he would be liable to pay in consequence of, or on purging his contempt." These sections appear to me to include the pre-

1862. July 15 and 22. DICKENS v. DICKENS.

sent case, and to discharge the respondent from any proceedings to enforce payment of the alimony, for non-payment of which he had been attached before his discharge. The order *nisi* for a sequestration must therefore be discharged.

November 11. POLLACK v. POLLACK AND DEANE AND MACNAMARA (the Queen's Proctor intervening).

POLLACK v. POLLACK AND DEANE AND MACNAMARA (the QUEEN'S PROCTOR intervening).

Decree Nisi.—Queen's Proctor's Intervention.—Pleas.—Attendance of Petitioner.

When, after a decree *nisi*, the Queen's Proctor intervened and pleaded collusion and condonation, and the petitioner took issue thereon, and the case was ready to be heard before the Court, a motion on behalf of the Queen's Proctor was made to order the attendance of the petitioner at the hearing under the 43rd section of Divorce Act. The Court refused to make such order, but ordered the proceedings to be stayed till he should attend.

This was originally the husband's petition for dissolution of marriage, to which the respondent did not answer. On the 25th of June, 1861, the Judge Ordinary made a decree *nisi* for a dissolution of the marriage, and before the decree was made absolute the Queen's Proctor obtained the leave of the Court to intervene, and filed pleas of collusion and condonation, on which the petitioner took issue; and these issues were now ready to be tried before the Court itself. On an affidavit of the Queen's Proctor stating as above, and that he believed that Mr. Pollack, the petitioner, was abroad, and that he was advised that in case the question of identity should be raised on behalf of the petitioner, his presence at the hearing of the cause would be necessary for the purpose of justice, and that

1862.
November 11.

POLLACK v. POLLACK AND DEANE AND MACNAMARA (the Queen's Proctor intervening).

the cause could not safely be brought to a hearing without the petitioner's presence thereat,

Dr. Spinks moved for an order on the petitioner to attend, and that cause should be deferred till next term.

THE JUDGE ORDINARY: I doubt whether I have power under the 43rd section of the Divorce Act, which undoubtedly is embodied in the more recent Acts, to make such an order unless the Queen's Proctor becomes a party to the suit whilst the questions are depending between the original parties. [*Dr. Spinks* referred to *Marris* v. *Marris and Burke, and the Queen's Proctor intervening, ante,* p. 530.] But there the Queen's Proctor intervened, and pleaded before the original petition was heard; but here, after the decree *nisi* has been obtained, the proceeding assumes a *quasi*-criminal shape; and I am not satisfied that I have power to order the attendance of the petitioner under the 43rd section of the Divorce Act. But I will make an order to stay proceedings till he appears.

THOMPSON *v.* THOMPSON and BARRAS.

1862.
November 25.

THOMPSON v. THOMPSON AND BARRAS.

Dissolution of Marriage.—Settlement.—22 & 23 Vict. c. 61, s. 5.

The Court will make no order respecting settled property under 22 & 23 Vict. c. 61, s. 5, after dissolution of marriage by reason of the wife's adultery, to deprive the husband of any benefit derived from the settlement.

This was originally the husband's petition for dissolution of marriage on the ground of the wife's adultery. On the 1st of July, 1862, the decree absolute was made, and the late

1862. November 25.

THOMPSON v. THOMPSON AND BARRAS.

wife now moved the Court to make an order with respect to a post-nuptial settlement under the 22 & 23 Vict. c. 61, s. 5, which enacts that "the Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit."

From the petition "of Mary Ann Barras, wife of James Barras, and formerly Mary Ann Thompson, the respondent in the above cause," and from Mr. Thompson's affidavit, filed in opposition to the motion, the following facts, among others, appeared: that Mrs. Thompson, under the wills of an aunt and of her father, became, on the death of her mother, in August, 1859, entitled to a life-interest in certain hereditaments, with remainder to her children. As this interest was not secured to her separate use, the husband, Thompson, became entitled during their joint lives, *jure mariti*. For some years previously the parties had been living separately, and after some negotiation, a deed of settlement was made in April, 1860, by which the property was conveyed to certain trustees, on trust to pay, during their joint lives, one-half of the proceeds to Thompson, and the other moiety to Mrs. Thompson "until the said Mary Ann Thompson shall commit any act of adultery, and the trustees for the time being acting in the trusts, etc., shall declare by writing under their hands that they have received evidence thereof," etc., from and after which time the trustees to pay Mrs. Thompson's moiety to Elizabeth Thompson, the daughter of the parties. In April, 1861, the trustees gave notice that they were satisfied that Mrs. Thompson had committed adultery, and that they intended to pay her moiety to the daughter. That Thompson had contributed nothing to the support of his

wife and child since 1840. On the other hand, Thompson alleged that before commencing his suit for dissolution, he had made his daughter a *bonâ fide* offer of a home, which she refused, and that she had been living and continued to live with her mother and Barras.

Dr. Middleton, under the above circumstances, moved the Court to direct that the moiety of the rents and profits now payable under the deed of settlement to James Henry Thompson shall for the future be applied for the use and benefit of the said Elizabeth Thompson, the only child of the said James Henry Thompson.

Dr. Swabey, for Mr. Thompson, was not called upon.

THE JUDGE ORDINARY: The section relied upon must be taken in connection with the 45th section of the original Divorce Act, which enacts that "in any case in which the Court shall pronounce a sentence of divorce or judicial separation for the adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property, either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof for the benefit of the innocent party, and of the children of the marriage, or either or any of them." Under this section the Court thought it had no power to deal with settlements, and therefore the 22 & 23 Vict. c. 61, gives that express power; but it never was intended that the Court should deprive an injured husband of the benefit he takes under a settlement at the prayer of the adulterous wife, whether for the benefit of the children or not.

July 22 and November 16.

BEAVAN v. BEAVAN.

ARTHUR HENRY BEAVAN (an infant, by Joanna Beavan, his guardian) *v.* EMILY LOUISA BEAVAN.

Petition by Infant.—Costs.—Alimony pendente lite.—*Wilful Neglect or Misconduct.*—20 & 21 *Vict. c.* 85, *s.* 31.

An infant husband, by his guardian, petitioned for dissolution by reason of his wife's adultery; the Court—

HELD, that the wife was entitled to have her costs taxed as usual, but refused to make any order for alimony *pendente lite*, the wife failing to show that the husband had any income or property, in possession or reversion.

B., an infant, married on the 29th of November, 1860, C., a prostitute several years older than himself; they lived together till the 22nd of December, when B., being a ward in Chancery, the parties were summoned before the Master of the Rolls, by whose order B. was delivered to his guardian and sent abroad. C. was interdicted from all intercourse or communication with B. C. remained till July, 1861, in the same lodgings in which she had cohabited with B., and there was no proof of any misconduct on her part while there. She applied to B.'s family for money, but received none. Adultery was charged and proved against her in October and November, 1861: and the Court—

HELD, that B. was entitled to his decree *nisi* for dissolution of the marriage.

This was a petition for dissolution of marriage by reason of the wife's alleged adultery, which she denied, and pleaded that before the alleged acts, to wit, on or about the 22nd of December, 1860, the petitioner deserted and wilfully separated himself from the respondent without any reasonable cause, and has continued so to desert the respondent, and has so wilfully neglected the respondent as to conduce to her committing adultery, on which plea the petitioner took issue.

On the 4th of April, 1862, a summons was issued on behalf of the respondent for payment into Court by the guardian of a sum to meet the respondent's costs of the hearing. The following affidavits were filed on that occasion, and as

they stated, for the most part accurately, the facts of the case, are here inserted:—

Affidavit of respondent, sworn 12th of April, 1862, saith:

"1. That I was married to the above-named petitioner, A. "H. Beavan, at the church of St. Paul's, Camden Town, in "the county of Middlesex, on the 29th of November, 1860.

"2. That I lived and cohabited with my said husband from "the day of our marriage as aforesaid till the 22nd of Decem- "ber, 1860, at No. 6, Victoria Terrace, Rochester Square, "Camden Town, in the said county of Middlesex.

"3. That on the 22nd of December, 1860, I was deserted "by my said husband, and left by him without any means of "support, and I have since that day received no pecuniary "support or assistance from my said husband or his friends, nor "have I ever seen or heard from him, and I am in consequence "of such desertion quite destitute and unable to meet the "necessary expenses of this suit.

"4. My said husband, as I believe, has been sent abroad "by his friends and relatives, and is not now residing in "England.

"5. I was deserted by my said husband under the follow- "ing circumstances. A few days before the said 22nd of De- "cember, 1860, my said husband and myself were served "with a summons to attend before his Honour the Master of "the Rolls, at his chambers in Chancery Lane. In the said "summons I was charged with having married an infant ward "of Court. I attended with my said husband at the cham- "bers of the Master of the Rolls on the said 22nd of Decem- "ber, 1860, in obedience to the said summons, and whilst I "was being examined by the said Master of the Rolls on the "subject of my marriage, my said husband was, as I believe, "taken away by his friends and relations, and I have never "since been able to find him, though I have made repeated "applications for the purpose to his mother and guardian in "this suit, and to others of his friends and relatives.

1862.
July 22 and November 16.

BEAVAN v. BEAVAN.

"6. Until I was served with the said summons, I was not "aware that my said husband was under the age of twenty-"one years, nor that he was a ward of the Court of Chancery, "as he always represented to me that he was twenty-one years "of age and upwards.

"7. My said husband's friends and relations are in wealthy "circumstances, and his said mother and guardian in this suit "is entitled, under the will of my said husband's father, who "died in the year 1852, to a life-interest in the sum of "£45,000 or thereabouts, one-fifth of which sum is by the "said will bequeathed to my said husband on the death of his "said mother."

Affidavit of Peter Barron Matthews, clerk to petitioner's solicitors, sworn 15th of April, 1862, saith:

"1. That I have been informed by Mr. Chas. John Shou-"bridge, one of my principals, and believe the same to be "true, that in the year 1853 a suit was instituted in the High "Court of Chancery by him or his late firm of Shoubridge "and Bramby, as solicitors for their next friend, on behalf of "Joanna Sophia Phillips Beavan, Hugh John Cadell Beavan, "Horace Charles Beavan, Arthur Henry Beavan, the above-"named petitioner, and Alfred Edward Beavan, the then in-"fant children of Henry William Beavan, deceased, against "Joanna Beavan, their mother and guardian, as the executrix "and one of the trustees of the will of the said Henry Wil-"liam Beavan, and also against Thomas Paterson Anderson, "the other trustee, as defendants thereto.

"2. I attended to the conduct and management of such "suit, and I say that such suit was instituted for (among "other purposes) the administration of the estate of the said "Henry William Beavan under the direction of the said "Court of Chancery, and is still pending; by means thereof "the said petitioner Arthur Henry Beavan became and still "is a ward of the said Court of Chancery.

"3. By an order bearing date the 22nd of December, 1860,

"made by his Honour the Master of the Rolls in the said "cause, it was ordered that the infant plaintiff, Arthur Henry "Beavan, should be forthwith delivered into the custody of his "guardian, the said defendant Joanna Beavan, and that the "said defendant, as such guardian, should be at liberty to "take or send the said infant abroad. And it was ordered "that Emily Louisa Dane, alleging herself to be the wife of "the said infant plaintiff, Arthur Henry Beavan, should be "restrained from having any interview with the infant plaintiff "Arthur Henry Beavan, and from having any intercourse or "communication with him directly or indirectly, by letter or "message, or by any messenger, or by any other manner "whatever, and from knowingly receiving any letter from the "said infant plaintiff Arthur Henry Beavan, or resorting to "any place for the purpose or with the view to meeting him, "or showing him that she was present. And it was ordered "that the said Emily Louisa Dane, alleging herself to be the "wife of the said infant plaintiff Arthur Henry Beavan, "should attend at the bar of that Court in the Rolls Yard, "Chancery Lane, in the county of Middlesex, on the 12th of "January, 1861, at three o'clock in the afternoon of that day, "to show cause why she should not be committed to the "Queen's Prison for marrying or attempting to marry the "said infant plaintiff, Arthur Henry Beavan. And it was "ordered that an inquiry should be made whether the said "infant plaintiff, Arthur Henry Beavan, had contracted a valid "marriage, and with whom, and under what circumstances.

"4. Pursuant to such order, the said Arthur Henry Bea-"van was delivered into the custody of his said guardian, and "he was sent by her abroad, as I was informed by the said "Mr. Shoubridge, and believe.

"5. By another order, bearing date the 20th of December, "1861, made in the said cause by his Honour the Master of "the Rolls, it was ordered that the said defendant Joanna "Beavan should be at liberty to take or send the said infant

1862. July 22 and November 16.

BEAVAN v. BEAVAN.

"ward, Arthur Henry Beavan (who, as I am informed by the "said Mr. Shoubridge, and believe, was then about to return "to this country), abroad any time within twelve months from "that day, and pursuant to such order, the said Arthur "Henry Beavan has (as I have been informed by the said Mr. "Shoubridge, and believe) been sent abroad."

Affidavit of Joanna Beavan, petitioner's guardian, sworn 14th of April, 1862, saith:

"1. That I am the mother of the petitioner, Arthur Henry "Beavan, and his guardian, appointed by the will of his "father, my late husband, Henry William Beavan, deceased.

"2. The said petitioner was born on the 22nd of July, "1844, and is now in the eighteenth year of his age.

"3. There is a suit pending in the High Court of Chancery "for the administration of the estate of my late husband, and "the said petitioner is a party to the said suit and is a ward of "the said Court in respect of his interest under the will of "my said late husband.

"4. The interest of the said petitioner under the said will "is contingent on his attaining twenty-one years of age, and "is a reversionary interest expectant on my decease, so that "unless he attains twenty-one and survives me, he will "never come into possession of any property under the said "will.

"5. He has no absolute present or vested interest in the "property whatsoever. No allowance is made to me for his "maintenance or education. He is entirely maintained and "educated by me out of my own income. He is not engaged "in any trade or profession, nor has he any means of gaining "his living, but is wholly dependent on me for his support. "At the time of his marriage with the respondent he was re-"siding at home with me, and was under the instruction of a "private tutor."

The summons was opposed by counsel on behalf of the guardian, but the judge made the order.

1862.
July 22 and November 16.

BEAVAN v. BEAVAN.

On the 28th of April, 1862, a petition for alimony *pendente lite* was filed by the respondent, to which the guardian refused to answer; but on summons, the judge, after hearing counsel and taking time to consider, directed that she should file an answer.

On the 22nd of July the question of alimony came before the Court on motion.

Mr. G. Francis, on behalf of the respondent, contended that the guardian was liable to all the incidents of the suit, and among them to alimony *pendente lite* in respect of property to which the infant was entitled, having regard to his position in life. [BY THE COURT: Has the infant any reversionary property within the meaning of the judge's remarks in *Stone* v. *Stone*, 3 Curt. 341?] The guardian is liable for necessaries for the infant; is she not so for those of the infant's wife? In *Chapple* v. *Anne Cooper*, 13 M. & W. 252, it was held that an infant widow is bound by her contract for the furnishing of the funeral of her husband, who left no property to be administered. In *Bruere* v. *Bruere*, 1 Curt. 566, the husband being an insolvent debtor, but entitled to an estate in reversion after his father's death, the Court refused to allot alimony *eo nomine*, but suspended the proceedings till some maintenance should be provided for the wife.[1]

[1] In *Malo* v. *Malo*, Consist. of London, November, 1786, Dr. Wynne, the then Chancellor, allotted alimony *pendente lite* on an allowance from father to son; it was the husband's suit, by reason of the wife's alleged adultery. The learned judge said:—"It is to be taken, then, "as proved that he is not of himself legally possessed of anything, and "that his allowance does not exceed £200 a year, and from thence I "must take what he may be able to allow. It frequently occurs, that "you cannot fix any certain sum as the property of the party who "brings the suit; but it does not follow from thence that a woman "against whom the suit is brought should be left in poverty and dis-"tress. It is plain in the present case that the father is a man of sub-"stance, by the allowance which it appears the son has received from

1862.
July 22 and November 16.
BEAVAN v. BEAVAN.

Dr. Spinks, contrà, for the guardian: The principle is, that the husband and wife separated howsoever, the wife, pending a suit in this Court, has a right to share the husband's income whatsoever; but, if there is no available income, the Court declines to make any order. As to reversionary interests, the question is, are they a marketable commodity? In this case, certainly not till the infant comes of age.

THE JUDGE ORDINARY: I am of opinion that I ought to make no order for alimony *pendente lite* in the present case; but, as the point raised, viz. the liability of the guardian, seems a new one, the costs of this argument may be taxed on behalf of the respondent.

On the 16th of November, the issues raised in the petition for dissolution came on for trial before the Judge Ordinary.

Mr. Serjeant Shee and *Dr. Spinks* for the petitioner.

Mr. G. Francis and *Mr. Tidswell* for the respondent.

The following, among other facts, were proved at the hearing:—

The petitioner, then between sixteen and seventeen years old, was, on the 29th of November, 1860, married to Emily Louisa Dane, at the district church of St. Paul, in the parish of St. Pancras; he was living with his mother, in Blandford Square. In the autumn of 1860 the respondent lived in, or frequented, a house of ill-fame in Dorchester Place. A police-

"him: if his son is maintained in any way, the Court, in this as in "other instances, is sometimes obliged to judge from appearances, and, "under all the circumstances, I allow £50 a year, from the return of "the original citation." Mr. Malo's proctor immediately undertook for payment of alimony and costs. (From a MS. note in the possession of one of the present reporters.)

man said, that she had not, to his knowledge, lived there since the beginning of November, 1860; that he had not seen Beavan, the petitioner, go to that house with the respondent, but had seen him go to the house in August, 1860, when she was living there. Her age, judging from appearance, was put by various witnesses at from twenty-eight to thirty-five. The marriage was by license, and the parish clerk being at first the only witness at hand, the respondent had gone out of the church and shortly returned with a woman, who signed the register. After the marriage the parties lived in Victoria Terrace, Camden Town, till they were taken before the Master of the Rolls, as stated in the affidavits above printed. According to the evidence of the landlord of the house in Victoria Terrace, the petitioner and respondent lived happily while they were together there; she came back after he did not return, and seemed miserable for a time after; she behaved decently while she stayed, which was till the end of July, 1861; used to go out about ten in the morning and returned at six, seven, or eight in the evening. She was asked once or twice for rent, but said she had no money.

The evidence of adultery, in October and November, 1861, was not contested by the respondent's counsel; on the other hand, it was not denied that she never had any money from the petitioner's family, though she had applied to them for assistance by letter.

Mr. G. Francis submitted that the neglect of the petitioner's family to support his wife, even admitting that, under the order of the Master of the Rolls, howsoever, the husband could not be said to have deserted his wife, necessarily threw such a wife back on her old course of life, and had so conduced to the adultery as to raise a case for the discretion of the Court under the 31st section of the Divorce Act. He cited *Coulthart* v. *Coulthart*, 28 L. J. 21; *Morgan* v. *Morgan*, 2 Curt. 688–9.

1862.
July 22 and November 16.
BEAVAN v. BEAVAN.

Mr. Serjeant Shee, contrà, cited *Du Terreaux* v. *Du Terreaux*, 1 Swab. & Tris. 555, and referred to Morgan's Divorce and Cripp's Divorce, H. L. Journals.

THE JUDGE ORDINARY: This is a suit for dissolution of marriage on the ground of the wife's adultery.

The case made on behalf of the respondent is not by way of bar to the prayer of the petition, assuming the adultery to be proved, but it is by way of appeal to the discretion of the Court. No authority gives so much anxiety to the Court in its exercise as a discretionary authority. The case is remarkable. A boy sixteen years of age marries a prostitute, whose age has been variously reckoned between twenty-eight and thirty-five; as far as experience goes, therefore, it was all on her side: her course of life had been such as that she must have been a pretty good judge of the ages of young men. I can't believe she thought him of age at the time of the marriage. I have no doubt that she knew he was not twenty-one; she certainly knew it was a clandestine marriage, and from the evidence of the parish clerk it appears that it was she who went out to seek the second witness and took the leading part. The Master of the Rolls, Beavan being a ward in Chancery, took upon himself to dissever them; when his judgment is impeached I dare say he will know how to vindicate his own order.

Without stating what is the law, it is enough now to say that it is generally supposed that till twenty-one years of age the Court of Chancery has such jurisdiction. It is said that the mother ought to have supported this woman; how could she expect that? The boy had nothing, and was out of the way; the mother was naturally indignant; the wife must have been prepared for the consequences of such a marriage; the husband did not leave her voluntarily; money he had none. Is it within the discretionary power of the Court to say that the family ought to find money?

1862.
July 22 and November 16.
BEAVAN v. BEAVAN.

There is no evidence of any endeavour after the separation to support herself by any honest means: the evidence offered is merely negative,—that for some time she did no positive harm during the hours she was in those lodgings. It would be a very bad example if this Court were to hold out that, whenever a prostitute inveigles a boy into marriage, his family is bound to maintain her.

Decree Nisi for dissolution.

JANE MUNT *v.* WILLIAM MUNT.

Nov. 11 and 25.
MUNT v. MUNT.

Sequestration.—Amount Due under Award.—Payment into Court.—Attorney's Lien.

On non-payment of certain sums due by way of alimony and costs, a writ of sequestration issued against the respondent's property, and an order was made on K. to pay into Court a sum of money awarded in an action in the Queen's Bench to be paid by K. to respondent. On motion on behalf of petitioner to order such sum to be paid out in part satisfaction of her attorney's taxed costs and her own alimony, the Court refused to make such order, H. and F., respondent's attorneys in the action in the Queen's Bench, having satisfied the Court, on affidavit, that they had a lien for costs in that cause exceeding the sum so paid into Court.

This was a question arising out of proceedings in the wife's petition for judicial separation, in the course of which certain orders had been made on the respondent to pay sums of money by way of costs and alimony, which he had disobeyed.

On the 27th of March, 1862, a writ of sequestration was issued against his property; and on the 15th of July an amended order was made, calling on Henry Kennedy, of Brighton, to pay, within three days after service of the order, into the registry of her Majesty's Court of Probate, the sum of £65. 5*s*., which, by an award, bearing date the 19th of May,

1862. Nov. 11 and 25.

MUNT v. MUNT.

1862, Mr. H. T. J. Macnamara had awarded to be paid by the said Henry Kennedy to William Munt, the respondent in this cause, in an action in the Court of Queen's Bench, wherein the said William Munt was plaintiff, and the said Henry Kennedy was defendant.

In obedience to such order, Henry Kennedy, by P. W. Dolman, his attorney, paid into the registry of the Court of Probate the sum of £65. 5*s*. On notice given to Mr. Dolman as Kennedy's attorney, to Messrs. Hillyer and Fenwick as Munt's attorneys in the action in the Queen's Bench, and to E. W. Crosse as his proctor in this suit,—

Dr. Spinks moved the Court to order the said sum of £65. 5*s*., so paid by the said Henry Kennedy into the registry, to be paid out; £40. 2*s*. 10*d*. to Montague Gosset (the petitioner's attorney), on account of a portion of his costs, as taxed and ordered to be paid; and the balance to the petitioner, on account of alimony ordered to be paid to her.

Messrs. Hillyer and Fenwick had served a notice on Mr. Gosset and on the registrar of the Court, to the effect that they claimed a lien upon, and to be entitled to, the sum of £65. 5*s*.; that the said sum was ordered to be paid by award (as above stated), which award was made a rule of the Court of Queen's Bench on the 13th of June; and that due notice of such lien was given to the defendant, and Mr. Dolman, his attorney, on the 15th of July.

Mr. J. Brown, on behalf of Messrs. Hillyer and Fenwick, opposed the motion.

THE COURT directed the matter to stand over for a more precise affidavit from Messrs. Hillyer and Fenwick as to their lien, and in reply to certain charges of contempt of Court brought against them by Mr. Gosset.

Messrs. Hillyer and Fenwick, on 20th of November, served

notices on Mr. Gosset and Mr. Crosse, to the effect that they should move the Court on the 25th of November, to order the said sum to be paid to themselves in part liquidation of costs, charges, and expenses, due and owing to them from the said William Munt, as his attorneys in the action in the Queen's Bench.

1862. Nov. 11 and 25.

MUNT v. MUNT.

On the renewed motion,

THE JUDGE ORDINARY said: This case stood over to give Messrs. Hillyer and Fenwick an opportunity of showing the lien they claimed, and of clearing themselves of an imputation of having treated the process of the Court with contempt. They do now show the existence of an attorney's lien for costs in the suit exceeding the amount paid into Court; all that the other side can do therefore is to tax their bill at the risk of costs.

APPENDIX II.

IN THE CONSISTORIAL COURT OF DUBLIN.

(*Before* DR. RADCLIFF, LL.D., Q.C., VICAR-GENERAL.)

SEAVER *v.* SEAVER.[1]

1846.

SEAVER v. SEAVER.

Restitution of Conjugal Rights.—Adultery.—Mutual Guilt.—Compensatio Criminis.—*Replication.*

A. (the wife) sued B. (her husband) for restitution of conjugal rights. B. plead in bar A.'s adultery. A., in her replication, (1) denied her adultery, and (2) recriminated B.'s adultery. The admission of so much of A.'s replication as recriminated B.'s adultery was opposed.

HELD (in the Consistorial Court of Dublin; and afterwards, on appeal, in the Court of Delegates, Ireland), that the doctrine of *compensatio criminis* applied to suits for restitution of conjugal rights; that A. was entitled to recriminate B.'s adultery; and that where both parties had been guilty of adultery, the Court would, at the suit of one of them, make a decree for restitution of conjugal rights.

This was a suit brought by Mrs. Seaver against her husband, for restitution of conjugal rights. The impugnant pleaded in bar his wife's adultery. The promovent replied, by way of recrimination, her husband's adultery. The question arose upon an objection to the admissibility of this replication. The facts of the case are sufficiently stated in the judgment.

Dr. Wiley argued the case for the promovent, Mrs. Seaver.

[1] The effect of a plea of *compensatio criminis* in a suit for restitution of conjugal rights was raised in *Hope* v. *Hope*, 1 Swab. & Trist. 94, where the Judge Ordinary decided that the plea was inadmissible. The important decisions given in Ireland in *Seaver* v. *Seaver*, on the same question, are not referred to in *Hope* v. *Hope*, there having been, at the date of that judgment, no published report of them. The reporters have been permitted, by the courtesy of Dr. Todd, LL.D., Barrister-at-Law in Dublin, who subsequently published a report of these judgments, to append his report of them to the present volume.

1846.

SEAVER v. SEAVER.

Dr. Hayes for Mr. Seaver, the impugnant.

Cur. adv. vult.

DR. RADCLIFF: This was a suit for restitution of conjugal rights, brought by Mrs. Seaver against her husband. A former suit had been instituted by this lady against her husband, for a divorce, on the grounds of cruelty and adultery, to which the husband pleaded a case of recrimination, charging her with adultery. Both parties were dismissed in that suit for failure of proof of their respective cases, and soon after the pronouncing of that order of dismissal the present suit was commenced. The libel in this suit was exhibited on the 9th of November, 1844; a reconventional matter was exhibited on behalf of the impugnant, in bar of his wife's suit, in which he prayed a decree of divorce, and pleaded that the promovent was of wanton habits, and of a debauched, discontented, and violent temper and inclination; that they cohabited together in France for some years after their marriage, until the 30th of October, 1833, when, by reason of debts there contracted by her, he fled from that country, where he left her with her children, and did not again see her until the month of February, 1841. That in the year 1834, Mrs. Seaver received money from her father to bring her home, where she remained until the spring of 1834, when, from wantonness, and without knowing where her husband was, she left her father's house, and returned to France. It then pleaded that she committed adultery, when in France, with one William Browne, and afterwards returned to England, and continued her adulterous intercourse with Browne, by whom she had a child in 1835, in London, after which she returned to Southsea, and there resided for some time, but without having any further intimacy with Browne.

He then pleaded that after the death of her father, in 1836, she returned to and resided at her husband's house in Ireland, and, while there, committed adultery with a person named Freeland, by whom she became pregnant before her husband's return from the Continent, in the month of February, 1841; and that, he believing her to be perfectly innocent, they cohabited, with occasional interruption and quarrels, till December, 1842, when their domestic differences caused a separation, which was followed by the suit already adverted to, pending which, he alleges, he discovered she had been guilty of the adulteries adverted to.

Issue having been joined on this reconventional matter, and several witnesses having been examined in support thereof, Mrs. Seaver exhibited the replication, the admission of which has been objected to;

since which Mr. Seaver has withdrawn his prayer for divorce on the ground of her adultery, and by a special proxy has authorized his proctor to abandon on the acts any such relief; so that the question respecting the admissibility of the promovent's pleading stands on different grounds from what it did when Mr. Seaver prayed for a divorce.

If the impugnant had persisted in his prayer for a divorce, there could be no question as to the promovent's right to recriminate, by pleading the adultery of the impugnant as a bar to that relief. When, therefore, the pleading of Mrs. Seaver was exhibited, it was clearly admissible. But it is contended, on behalf of the impugnant, that in a suit for restitution of conjugal rights, the adultery of the promovent bars her of all remedy, notwithstanding the adultery of the husband, although, if the husband sought for a divorce, his own adultery, at any time before suit, would bar his right to such relief. It was also objected that the same matters were alleged in the former suit for a divorce, but this is no objection to the pleading, as was decided by the Privy Council in the case of *Moore* v. *Moore*, 3 Mo. P. C. Cas. 86.

Mrs. Seaver's pleading has been supported on three grounds:—first, malicious desertion; secondly, that if the husband fail in his proof and she succeed in proving his adultery, she may change her prayer and seek a divorce; thirdly, that the mutual adultery is a *compensatio criminis*, and puts the parties in the same position as if no adultery had been committed by either of them.

As to the first point, malicious desertion, some doubts have been entertained whether it be a circumstance to bar the husband, unless he was guilty of connivance. The question was discussed in *Clowes* v. *Clowes*, 4 No. Ca. 29, in the Arches Court (and see *Philips* v. *Philips*, 1 Rob. 162).

As to the second point, viz. the right of the wife to change her prayer, the case of *Kirby* v. *Kirby*, 2 Curt. 216, *note*, has been cited. It is an authority which would justify the Court in admitting this pleading, although it is not clear from that case that a wife could, under the circumstances of this case, change her prayer into one for separation. Such an allegation was rejected in the case of *Raibould* v. *Raibould*, 2 Curt. 214, *note*, but the difficulty was got over in *Kirby* v. *Kirby*.

Originally a divorce could not be decreed in a restitution suit; but in progress of time, to save expense, and for other reasons, a contrary practice has been adopted, originating probably in the desire, as the husband must pay all the costs, to make one suit answer the purpose

1846. SEAVER v. SEAVER. of settling every question between the same parties; so, in this case, there is no reason why the wife should be compelled to institute a second suit against her husband, in which the same evidence would be relied on. On this ground, therefore, I think the pleading would be admissible.

It now remains to consider the third ground relied on to sustain the admissibility of this pleading, namely, *compensatio criminis*, and its effect. Not being able to find any authority expressly deciding that a wife would be entitled to a decree for restitution of conjugal rights, in a case where mutual adultery was proved, and supposing, from the observations of Dr. Lushington in some of the reported cases, that there had been a decided case on the subject, or some acknowledged practice, I delayed giving my judgment until I had an opportunity of communicating with that learned judge. In reply to my communication, he has kindly informed me, that having conferred with that eminent advocate Dr. Haggard, he could not discover that there was any decided case or any known fixed rule of practice on the subject. The absence of such a decision may be accounted for partly by the disinclination of the adulteresses to return to their husbands, and partly by the paucity of cases in which husbands, guilty themselves of adultery, have had the inhumanity to cast their wives penniless on the world; or the opinion of the profession may have been adverse to the maintenance of suits for restitution in cases of mutual adultery. However that may be, I cannot have the advantage of any decided case to guide me on the present occasion, and must, therefore, resort to other sources of information.

The decision of this question depends on the effect which is given to a plea of *compensatio criminis* by the law of the Ecclesiastical Courts in these countries. By the Canon Law, no intermediate state between cohabitation and a formal separation was acknowledged; all separations merely voluntary were held to be illegal, and not to be tolerated or presumed. If the parties were not entitled to and did not obtain a divorce *à mensâ et thoro*, they were under a legal obligation to return to cohabitation. If, under that law, one party sued for a divorce, because of adultery committed by the other, the right to relief was barred by proof that the complainant was also guilty of the same offence; this was styled *compensatio criminis*. The right to relief might also be barred by proof of condonation or connivance; so in suits for restitution, or in which a decree for restitution, though not the primary object, might be obtained, if the party proceeded against sought to bar

the suit by a plea of adultery committed by the promovent, the promovent might reply the adultery of the impugnant, or condonation, or connivance; and on proof of any of these, the promovent would be entitled to a decree for restitution.

It has, however, been contended that this is not the law of these countries, *first*, because the Canon Law respecting marriage was not received in England to this extent before the Act of 28 Hen. VIII. c. 13, s. 10; *secondly*, because, whether it were received to this extent or not before the passing of that Act, it cannot be the law of this country since that Act, because it is contrary to the Common Law and the first principles of justice; and *thirdly*, that the total absence of authority to prove that it was introduced into these countries proves that it was always rejected here.

As to the first argument, viz. that this doctrine of the Canon Law was not received in this country prior to the statute of Henry VIII., the doctrine of *compensatio criminis* is a principle applicable, in the Canon Law, to all suits. That law, as cited in 2 Consist. 299, *in notis*, acts on the principle, "quod cum paria crimina compensatione mutuâ deleantur," *i. e.* blotted out; the maxim was adopted from the Civil Law, "pariâ enim delicta mutuâ pensatione dissolvuntur," Dig. xxiv. 3, 39, *i. e.* annulled, cancelled, or abrogated. In this country it is called a "set-off;" the meaning is the same in all, and the only question is as to the applicability of the doctrine to this particular suit for restitution. This principle and doctrine were always, and are now, undoubtedly received in this country to some extent, namely, as a bar to a divorce, and the *onus* would seem to lie on the party seeking to limit their consequences to cite some authority to show that this blotting out, cancellation, or set-off, only applied to suits in which a divorce was sought, especially as our law of matrimony and divorce has been derived from the Canon Law, by which law the rule was applied to restitution suits. Lord Stowell, in the case of *Proctor* v. *Proctor*, 2 Hag. 300, states this clearly:—"It "is notorious that this country, at the Reformation, adopted almost "the whole of the law of matrimony, together with all its doctrines of "indissolubility, of contracts 'per verba de præsenti et per verba de "'futuro,' of separations *à mensâ et thoro*, and many others. The "whole of our matrimonial law is, in matter and form, constructed "upon it; some Canons of our own may have varied it; and a higher "authority, that of the Legislature, has swept away some important "parts of it; but the doctrine of indissolubility remains in full force.

1846. SEAVER v. SEAVER.

"The very practice of the Legislature in granting, by special Acts, par-
"ticular divorces in particular cases, affirms the indissolubility as ex-
"isting in the general law, and to be maintained by the Courts in
"their dispensations of justice. The principle of indissolubility brings
"with it all its consequences,—that every breach of the remaining
"*vinculum* continues with all the legal brand of adultery upon it, fully
"as much as at any period of its existence. It is a *par delictum* with
"any other act of adultery that may have taken place during any former
"period of the marriage contract. Of course, it carries with it all the
"disability which an adultery creates of obtaining an authorized separa-
"tion." In this passage Lord Stowell shows that not only was our matrimonial law adopted from the Canon Law, but that, from the admission of a general principle, all the legal consequences of that principle must follow, and that *compensatio criminis* is in force here, with all its consequences.

Not only is there no decision to negative the applicability of this doctrine of recrimination to restitution suits, and its reception here before the Act of Hen. VIII., but there is much in the Statute of Westminster 2nd, chap. 34, 2 Inst., 432, to show it was then in full force. "Et si uxor sponte reliquerit virum suum, et abierit, et moretur cum "adultero suo, amittat in perpetuum actionem petendi dotem suam, "quæ ei competere posset de tenementis viri sui, si super hoc convin-"catur, nisi vir suus *sponte* et absque cohertione ecclesiasticâ eam re-"conciliet, et secum cohabitare permittat, in quo casu restituatur ei "actio."

This, however, is not conclusive, as the sentence referred to might have been founded on connivance; but it shows that the Ecclesiastical Courts then claimed and exercised a power to compel a husband to take back and cohabit with an adulteress, in some possible case, where he did not voluntarily forgive her; and this recognition is to some extent an admission that this practice was not at variance with the spirit of the Common Law.

That condonation of, or connivance at, the wife's adultery will bar a husband from relying on that adultery as a bar to a suit for restitution, would seem to be the received and admitted law of our Courts at the present time, in the opinion not only of the best authors, whom I shall cite hereafter, but of some eminent judges. In *Moore* v. *Moore*, 3 Moore, P. C. 86, Dr. Lushington says:—"Unless the husband has "condoned or been a party to the concealment of acts of adultery, it is "undoubtedly competent for him to allege them as grounds for a de-

"cree in a suit for restitution of conjugal rights, even though they "should not be sufficiently specific to support an allegation in a suit "for divorce; but there is a great difference between a suit for resti- "tution and a suit for divorce, which this case has in fact now be- "come." Here he assumes that if the husband had condoned or connived at his wife's adultery, he could not rely upon it. The effect of condonation is so strong, that in certain cases, if the husband's adultery be condoned, and long afterwards the wife should commit adultery, the husband would be entitled to a divorce: *Anachini* v. *Anachini*, 2 Curt. 214; and if this be so, it would seem to be an *à fortiori* case that such condoned adultery would not bar him or her obtaining a sentence of restitution: *Westmeath* v. *Westmeath*, 2 Hagg. Suppl. 114. In *Dennis* v. *Dennis*, reported in the note to *Turton* v. *Turton*, 3 Hagg. 353, Lord Stowell said, "That though a wife was entitled to her "dismissal, on the ground of the husband's connivance at her incest "with his brother, it did not necessarily follow that in a suit for resti- "tution of conjugal rights, the Court would compel the husband to "return to an incestuous bed," admitting the general rule. In *Dillon* v. *Dillon*, 3 Curt. 86, a divorce was refused, chiefly on the ground of the husband's connivance, and the suit dismissed. Immediately afterwards, the wife instituted a suit for restitution; but the husband stated he was too poor to defend it, and submitted to a sentence, 1 No. Cas. 443,—which would indicate an opinion in the profession that the adultery of a wife, if connived at, would not bar her suit for restitution. On the whole, then, it seems to me that condonation or connivance would prevent a husband relying on his wife's adultery, so condoned or connived at, as a bar to her suit for restitution. And if this be so, adopting the general principle that if parties are not entitled to a divorce, they may be compelled to cohabit, there are two cases in which, according to the principles of the Canon Law, an adulteress may obtain a decree for restitution of conjugal rights. It is not probable that when the ultimate appeal was to Rome, the doctrine of *compensatio criminis*, so favoured by the Canon Law, would have been curtailed, as is contended, particularly when adultery was considered so high a crime. However, there is a distinction in point of criminality between connivance and *compensatio:* connivance is not only guilt on the part of the husband, but also acquiescence or consent; it falls within the rule *volenti non fit injuria:* Shelford on Marriage, 449. It may be passive, but there must be an intention that the guilt should ensue, something more than mere negligence; it must be intentional

1846. SEAVER v. SEAVER

concurrence, in order to amount to a bar: *Rogers* v. *Rogers*, 3 Hagg. 59. It is, in part, collusion; it is what Dr. Lushington, in *Moore* v. *Moore*, refers to as "being a party to the concealment of acts of adul-"tery." In other writers, Clarke, Conset, Oughton, it is called knowledge. But however different may be the degrees of guilt, the existence of the rule shows that the doctrines and rules of the Canon Law, in that respect, were fully carried out in the Ecclesiastical Courts of this country. To the Canon Law the judges of these Courts have had recourse for a guide in matrimonial questions, whenever any difficult or novel question arises. In the view of the Canon Law, as well as of our Ecclesiastical Courts, adultery was, as it still is, an odious crime. Our sixty-first Canon, similar to the English Canon, calls on churchwardens to present it. A suit may be instituted by the Office to punish it as a crime. The illegality of any intermediate state between cohabitation and legal separation, the leading doctrine of the Canon Law, was also the settled doctrine of the Ecclesiastical Courts. In *Mortimer* v. *Mortimer*, 2 Consist. 318, Lord Stowell says: "This Court considers "a private separation as an illegal contract, implying a renunciation of "stipulated duties;" and in *Warrender* v. *Warrender*, 2 Cl. & F. 561, Lord Lyndhurst says: "One may pledge himself not to claim or "institute a suit for restitution of conjugal rights, but he cannot be "bound by any such pledge, for it is against the inherent condition of "the married state." Here, then, we have by judicial *dicta* the whole of the Canon Law rules recognized as the settled law of these Courts, although there is no actual decision in print declaring that *compensatio criminis*—received here, in all other cases, equally with connivance—is to have the same force in suits for restitution of conjugal rights. It is said the Court will not assist an adulteress; but it does in the cases above mentioned, if such be assistance. But if this doctrine be not applied to this case, as it is contended on behalf of the impugnant it ought not to be, the husband will derive a benefit from his plea alleging his wife's adultery, for if he is not compelled to take her home, he need not maintain her; inasmuch as the cases at Common Law which have been cited establish, that if sued at law for goods supplied to her, he will be entitled to a verdict on a proof of her adultery, no matter what his own guilt may be. Will not this refusal, then, have almost all the effect of a sentence of separation, contrary to every principle of these Courts and of the Civil Law?—"Viro atque uxore mores "invicem accusantibus causam repudii dedisse utrumque pronuntiatum "est" (Dig. xxiv. 3, 39).

But the question does not rest solely on principle. On referring to the 'Reformatio Legum,' which shows to what extent the Canon Law was at that time received in England, it will appear that the doctrine is applied to suits for restitution: "Si persona, quæ fuerit adulterii "convicta, crimen in altero conjuge possit idem ostendere, et osten- "derit priusquam conjux ad novas nuptias diverterit, utriusque conjugis "culpa par in pares incidet pœnas, et prius inter illos firmum manebit "matrimonium" (Ref. Leg. de Adult. c. 17).

Throughout the whole title, "*De adulteriis et divortiis*," in the 'Reformatio Legum,' most of the Canon Law is adopted. Cap. 1 begins by denouncing the crime of adultery. Capp. 2, 3, and 4 prescribe severe punishments. Cap. 5 permits the innocent party to marry again. Cap. 6 recommends forgiveness, and taking back the guilty party. Cap. 7 prohibits separation for adultery, unless after judicial sentence. Cap. 16 provides that if the husband be *suasor aut author* of his wife's adultery, she shall be condemned, but he also *lenocinii reus pronunciabitur*, but neither shall be freed from the bonds of matrimony: like rule as to the wife. Cap. 17 contains the passage I have already cited; and cap. 19 abolishes divorce *à mensâ et thoro* altogether, as contrary to Scripture, and mischievous. This whole intended code of matrimonial law for England adopts most of the rules of the Canon Law, fits them to absolute divorce, and by not permitting any divorce *à mensâ et thoro*, and no voluntary separation, and no divorce if both be guilty of adultery, it virtually declares that adultery is no bar to restitution if both be guilty. This would seem to show that the Canon Law was on this point theretofore in force, and that there was nothing in it contrarient to the common law of England, or repugnant to the authorities of that day. The question, then, remains—Is the rule applicable to suits for restitution in practice? In such a case as this, it may be permitted to refer to text-writers and books of practice. Clarke, in his 'Praxis,' written A.D. 1596, tit. 115, discusses, among others, *compensatio* as a bar to divorce; and, tit. 116, amongst the causes "quæ "impediunt restitutionem in causâ matrimoniali," enumerates "proba- "tio quod post contractum, vel citra solemnizatum matrimonium ac re- "cessum mulieris a viro (vel e contra), vir vel uxor commiserit adulte- "rium, sufficit ad impediendum restitutionem in causâ matrimoniali. "In hoc tamen casu, si pars actrix replicaverit, et probaverit *compen- "sationem*, vel *scientiam*, *condonationem*, vel remissionem criminis ut "superius notatur in proximo precedente titulo,—obtinebit actor resti- "tutionem petitam." Oughton, also, in tit. 215, 216, discusses the

1846. SEAVER v. SEAVER.

subject, and states the law and practice, as laid down by Clarke, in very nearly his words.

These passages in Clarke and Oughton are adopted almost verbatim by Conset. pars 6, sect. 2, no. 6. In Floyer's 'Practice,' 2nd edition, 1746, p. 48, it is stated :—"In causes of restitution of conjugal rights, the "adultery of the promovent, alleged and proved by defendant, hinders "a restitution, unless promovent proves a compensation or remission of "the crime;" and in Poynter, p. 224, the husband's adultery is stated "to be a complete remission or compensation of the injury he complains "of: he is thereby entirely barred of his remedy, and becomes subject to "all the inconveniences which the claims of a licentious wife and a spu- "rious issue may occasion him, and liable to a suit to be instituted on "*her* part for the restitution of her conjugal rights, in which, unless barred "by new facts, she would, it is presumed, be entitled to the sentence "of the Court, whereby he would be enjoined to receive back his wife, "and treat her with conjugal affection." In a note to this passage he observes on *Proctor* v. *Proctor*, and in another note, after quoting a passage from Ayliffe as to the effect of the husband's adultery *after* a sentence for divorce, suggests a doubt as to Ayliffe's opinion being now law; and in p. 245 he says :—"A plea in bar to a suit for resti- "tution may be defeated (as if it were originally a suit for divorce) by "a counter-plea, alleging condonation, compensation, etc., which, if "established, would, it is presumed, by placing the parties on their "original ground, entitle the party praying restitution to the benefit of "the sentence prayed for." Dr. Addams, in his note to *Brisco* v. *Brisco*, 2 Add. 264, states that the law is accurately laid down by Poynter, but explains that Poynter's doubts, as to *compensatio criminis* entitling a wife to restitution after *sentence* of divorce, founded on the passage in Ayliffe, were not well founded, admitting that he is in the main correct.

So far as to books of practice, the earlier of which are of great weight, as showing that the settled practice was to allow recrimination in suits for restitution, which could only be in order to neutralize the defendant's charge, because at that time divorce was not prayed or granted in such suits, nor till about 1730, as appears by the cases cited in *Best* v. *Best*, 1 Add. 412. Ayliffe pushes the doctrine further, in which he is wrong, if he applied his observation to a civil suit. He says :—"But if the husband shall, after such divorce, commit fornica- "tion, the marriage shall be restored, on the score of his lewdness, and "the husband, for a punishment thereof, shall be obliged to receive his

"wife again;" and cites 32 Q. 5, 3, that is the 32nd cause, question 5, and chap. 3 of the 2nd Book of the Decrees; which refers, however, to a criminal suit by the Office, and not to a suit for restitution by the party, as would appear from the note in 2 Add. p. 264, who does not suggest a doubt as to the doctrine of compensation having been received and adopted in England.

Mr. Shelford, in his 'Law of Marriage,' p. 577, also makes some valuable observations on this subject.

There are several *dicta* on the subject to be found in the reported cases. Thus, Lord Stowell, in *Beeby* v. *Beeby*, 1 Hagg. 789:—"It is "not unfit, if he who is the guardian of the purity of his house has "converted it into a brothel, that he should not be allowed to complain "of the pollution which he himself has introduced, if he, who has first "violated his marriage vow, should be barred of his remedy. The par- "ties may live together, and find sources of mutual forgiveness in the "humiliation of mutual guilt." He does not say that they *must* live together, but otherwise the passage is unmeaning. In *Anachini* v. *Anachini*, 2 Curt. 219, Dr. Lushington says:—"I next look at the "consequences of such a principle of law. If a husband be not entitled "to a separation from his wife, he is bound to cohabit with her, and "how difficult would it be to enforce such a principle of law! I know "no authority which states that whatever be the guilt of both parties, "if the Court does not pronounce for a separation, they are not, ac- "cording to the law of this country, bound to live together; and I "think such a principle would be dangerous to society and to public "morals." No doubt, these observations were made in a case of condonation; this however makes no difference in principle, nor are they confined by Dr. Lushington to such cases. In *Kirby* v. *Kirby*, 2 Curt. 215, Sir W. Wynne observes:—"Suppose she proves adultery against the "husband, she is not obliged to pray separation, and he could not set "up his own adultery in bar. If both prove adultery, it is not neces- "sary to say now what would be the consequence; perhaps the Court "might say it would give no sentence." The difficulty in this case also was caused by the wife praying a divorce, her suit being originally commenced for restitution. If the law be clear, that recrimination would be an answer in a suit for restitution, why should there be any difficulty in dismissing the suit if the adultery of both parties be proved?

In reply to all this there has been much argument, but very little authority has been adduced. The following passage in the judgment

1846. SEAVER v. SEAVER.

of Lord Stowell, in *Proctor* v. *Proctor* (p. 302), has been mainly relied on, viz.: "There is no return to cohabitation, nor any means to be "resorted to for the purpose of compelling it." If Lord Stowell meant that no suit for restitution of conjugal rights could be maintained, it is difficult to reconcile such a statement with his previous observations, referring our whole law of divorce to the Canon Law, when not altered by our canons or statutes. He may have meant that in the particular divorce suit, or in a suit to punish the adultery, no such order for restitution of conjugal rights could be made. If a wife improperly sues for a divorce, she may, in general, be ordered to return to her husband on failing in her suit, and to this Lord Stowell may have alluded. There is certainly great difficulty in the passage, which puzzled Poynter (p. 225) also; but it is not cited for this purpose by Mr. Shelford, although he gives other authorities. Dr. Addams, in his note, 2 Add. 264, also throws a doubt on the meaning of this passage, and inclines to refer the observation to a criminal proceeding by the Office. A passage from Mr. Shelford's work has been also relied on for the impugnant in p. 422:—"The husband is not bound to re- "ceive or to support his wife after her commission of adultery, al- "though he had before been guilty of adultery, and turned her out "of doors without any imputation on her conduct. In such a case, "the Ecclesiastical Court would not assist the wife in a suit for resti- "tution of conjugal rights;" and in support of this position he recites *Govier* v. *Hancock*, 6 T. R. 603, decided in 1796, where a *dictum* to that effect is to be found in the judgment of the Court. The point, however, was not argued; the case itself was a hard one; a husband had turned out his wife when innocent, and taken in another woman. It was so decided for the first time. He refers also to a similar *dictum* in *Rex* v. *Flintan*, 1 B. & Ad. 227, decided in 1830. The defendant had been convicted under the English Poor Law for not maintaining his wife. It appeared that she had sued her husband in the Ecclesiastical Court, by reason of adultery committed by her husband. She failed in her suit, the husband having pleaded in recrimination her adultery, which had been committed by her when living with him, but without his knowledge or condonation; his adultery was committed after she had left him. In this case, Bayly, J., observes (p. 229): "How can he be bound to maintain her, if he can neither be sued for "maintenance found her, nor for restitution of conjugal rights?" This position of Mr. Shelford's is founded solely on these *dicta* of Common Law judges on a point not within their jurisdiction, and not even argued

before them by civilians. The case of *Proctor* v. *Proctor* is cited in the last case, and probably misunderstood. In both cases the wife was living apart from her husband, and not desirous to return. In *Astley* v. *Astley*, 1 Hagg. 722, Dr. Lushington, observing upon the inconveniences that might follow from the doctrine of recrimination urged in a suit for divorce brought by a husband, namely, his liability for her debts and obligation to support a spurious offspring, adds: "It is to "be remembered that the wife will equally suffer inconvenience if a "sentence be given against her and she be turned loose upon the "world." How so, it is said, if she could sue for restitution? Yet these observations would equally apply in the case of *Anachini* v. *Anachini*. However, in *Astley* v. *Astley*, Dr. Lushington had before him (p. 722) *Naylor* v. *Naylor*, which was a restitution suit brought by the wife, in which her adultery was relied on by the husband, who, on this ground, prayed a divorce; the wife replied recrimination as a bar to the divorce only, and not for the purpose of entitling her to restitution.

I cannot find any other authorities affecting the wife's right to restitution, and none have been cited. The cases on dower do not apply, as they are all founded on an Act of Parliament, a woman before that Act not having been barred of her dower by reason of adultery. The cases decided at law in actions for maintenance do not apply, as they proceed and Common Law Courts act on a different principle. In *Rex* v. *Flintan*, above referred to, Bayly, J., says: "The ground of a husband's "liability in an action for goods supplied to his wife is a supposed au- "thority communicated to her by him; but when she improperly leaves "him that authority is determined." The cases on this subject are collected in Starkie on Evidence, pp. 540–1.

All these authorities and writers satisfy me that there has been, up to a very recent period, from a remote period, a general understanding among all the writers, practitioners, and judges of these Courts, that the law of recrimination applied to prevent a defendant in a suit for restitution from relying on the promovent's adultery as a bar, as it did in the Canon Law, and that during all this period there was no decision, or even a well-considered *dictum* to the contrary, Such a rule is consistent with the whole code of law on marriage and divorce in the general Canon Law, as well as the particular law admittedly received here, and the *status* of the parties. Nothing has been adduced against it except the loose *dicta* already noticed, which, if carried out, would introduce great confusion, and perhaps criminality. I can find no

1846. SEAVER v. SEAVER.

principle on which to rest a decision in favour of the impugnant. At first I was disposed to think the rule of the Court might be not to assist either party under such circumstances, and to dismiss the promovent; but on consideration I do not think such is the rule.

If the promovent was to be barred in a suit for restitution, in cases of mutual adultery, this would give the other party a *legal* separation, and enable that party to free himself or herself from the matrimonial bond, though equally guilty; this Court would thereby sanction a renunciation of stipulated duties, a dereliction of those mutual offices which the parties are not at liberty to desert. In this case it would enable the husband to send his wife a beggar into the world, and perhaps compel her to resort to prostitution for the means of subsistence, a course not quite consistent with the principles of the law on this subject. If the wife were the impugnant, it would enable her virtually to have a divorce, although her husband, on finding he could not get a divorce, might desire to take her home, and protect himself from debts and a spurious issue. The cases which establish that a slighter proof of adultery suffices to bar a restitution suit than to obtain a divorce, do not militate against this, as the crime must be proved to the satisfaction of the Court, although not so fully as in a suit originally for divorce. Not being at present able to discover any sound principle on which I can reject this pleading,—though entertaining as strong a disinclination as any judge ever did to extend the doctrine of recrimination,—I feel myself coerced to admit it to proof, though I entertain great doubts on the subject. To warrant me in rejecting the pleading, and so for ever preclude the promovent from raising the question, I should entertain a decided opinion against her. But as it is, I give her the benefit of my doubts, as by so doing, though I may put the impugnant to greater expense, I do no other injury, as the question will be as open on the hearing as now, if both cases proceed. On both grounds, therefore, I overrule the general objection to the promovent's pleading, which must be reformed in some particulars, after which the rule can be entered, so as to give the impugnant an opportunity of appealing at once, which it would be very desirable he should do.

From this Judgment an Appeal was brought to the Court of Delegates.

(Coram *the* HONOURABLE JUDGE CRAMPTON, DR. STOCK, LL.D., *Judge of the Court of Admiralty, and* DR. MOUNTEFORD LONGFIELD, LL.D., *now one of the Commissioners of the Court for the Sale of Incumbered Estates in Ireland.*)

Sir H. Meredith, Q.C., and *Dr. Hayes*, appeared for the appellant; *Sir T. Staples*, Q.C., and *Dr. Wiley*, for the respondent.

CRAMPTON, J., delivered the judgment of the Court:—

This is an Appeal from an Order of the Consistorial Court of Dublin.

The Order appealed from is dated the 18th of April, 1846, and is an Order admitting to proof a defensive pleading put in by the promovent in the Court below, by way of replication to a plea in bar; and the question of this Court is, whether the learned Judge should have rejected or admitted that pleading.

According to the old practice of the Court, for which the summary proceeding by motion has, in later times, been substituted, the impugnant would have taken an exception or demurrer to the pleading objected to. A demurrer, we know, admits the facts pleaded. The Appeal, therefore, proceeds upon the principle that, if the whole of pleading excepted to were established by proof, it would furnish no answer to the case made by the impugnant's plea.

I shall state the substance of the pleadings, in order to see whether the pleading, thus excepted to, be or be not an answer to the plea in bar.

The suit is brought by Mrs. Jane Stewart Seaver for restitution of conjugal rights.

The husband, Mr. Seaver, pleads in bar a reconventional matter, alleging adultery on the part of the promovent, and concluding by a prayer for a separation *à mensâ et thoro*.

The wife, the promovent below, exhibits a defensive pleading in the nature of a replication; she denies the adultery charged, and she recriminates on the husband, charging him with adultery, cruelty, and profligate incitements to her to commit adultery.

From the pleadings it appears, that there had been a former suit between these parties; that Mrs. Seaver had instituted a suit for divorce and alimony, on the ground of cruelty and adultery; and that Mr. Seaver had pleaded, in bar, adultery on the part of the promovent, and prayed a divorce; and that the cause having been heard on pleadings and proofs, the suit had been dismissed, and the prayer of both parties refused.

I mention this previous suit to put it out of the way, for it is nothing more than evidence of that which must be assumed for the argu-

1846. SEAVER v. SEAVER.

ment of this case, namely, that both promovent and impugnant, wife and husband, have been unfaithful to their marriage vows and duties, and have each established against the other a case of adultery. They are, in this respect, *in pari delicto*.

The dates of the proceedings in the present suit are these:—

9th November, 1844.—Mrs. Seaver exhibited her libel in this suit, praying restitution of conjugal rights.

21st June, 1845.—Mr. Seaver exhibited his reconventional matter charging adultery, and praying for a divorce.

April, 1846.—Mrs. Seaver offered her defensive pleading, the subject of the present exception, and on the 18th April, 1846, the order appealed from was pronounced.

The prayer for divorce in the husband's plea was on the same day, 18th April, 1846, on his own motion struck out by the Court.

If that amendment had not been made, it is, I think, plain that the wife's defensive pleading could not be rejected. For, by the reconventional matter praying *a divorce*, the suit for restitution was turned very much into a suit for divorce. The husband so far became a promovent or actor in the cause, and the wife was put upon her defence. And nothing can be better established than the position that a party, who is himself an adulterer, cannot obtain a divorce from his guilty partner on the ground of adultery. And I may add that this amendment is a confession, on the husband's part, that he is not entitled to a separation.

I shall now, then, take the case as if the amended pleading had stood originally as it now appears. And I think the substance of the case will remain as before.

As before intimated, I assume the case of mutual guilt,—that each party has established adultery against the other. By the law of England this is a state of things in which neither party can claim to be divorced from the other. The *vinculum matrimonii* remains by law unbroken; and are not its rights and its duties therefore unchanged? It is otherwise in the law of Scotland; but our present inquiry is, what is the law of England on this important subject?

Where both husband and wife are equally guilty; where each has lost the right of claiming a legal separation from the other; where the *vinculum matrimonii* is, by the law of England, indissoluble; shall mutual criminality emancipate the parties from ties and duties which the Common and Ecclesiastical Law of the country pronounces to be indissoluble? In such a state of things, does anything remain, but repentance for the past, and a return to the discharge of conjugal duty?

There has been mutual injury; there should be mutual forgiveness. There has been a common crime; there should be common contrition, mutual humiliation, and mutual compensation.

I can find neither principle or authority in the law of England for a middle state in the relation of husband and wife between that of *consortium vitæ* and *divortium à mensâ et thoro* (2 Hagg. Consist. 298).

"Viro atque uxore invicem accusantibus causam repudii dedisse "utrumque pronuntiatum est; id ita accipi debet, ut eâ lege, quam "ambo contempserunt, neuter vindicetur, paria enim delicta mutuâ "pensatione *dissolvuntur*,"—is the language of the Digest; and two principles are here laid down, applicable to the present case, viz. that the injured party is entitled to claim a separation from the guilty partner; but that, where the guilt is mutual, the guilt of each, as respects the other, is *annulled*, and each has lost the right of calling for a separation. This doctrine is called by the ecclesiastical writers the doctrine of compensation.

It is, beyond controversy, a doctrine of the Canon Law; and that it has been incorporated into the Ecclesiastical Law of England, appears to me to be equally clear; and the result of this doctrine of compensation, coupled with the admitted principle of the law of England, that the *vinculum matrimonii* is indissoluble, seems to me necessarily to lead to the conclusion that, where there is not a *casus separationis*, the law implies the *consortium vitæ*, and in this indissolubility of marriage, according to the law of England, we may perhaps find the reason of its difference from the law of Scotland on the subject of compensation.

The Appellant's counsel scarcely denied that compensation was a doctrine of our Ecclesiastical Law; but they contended that it was a doctrine of neutrality, and that it declared both parties unworthy of any aid from the Ecclesiastical Court, and had the effect of tying up the hands of the Court from giving any relief to either of the guilty parties.

But I can find no ground for this limitation; on the contrary, all the writers upon our Ecclesiastical Law, from the earliest to the latest, state the doctrine of compensation exactly as the doctors of the Canon Law do. Oughton is express upon the subject. After laying down that adultery on the Promovent's part is a bar to the claim of restitution of conjugal rights, Oughton adds:—"In hoc casu tamen, si actor "replicaverit et probaverit compensationem vel scientiam, condonatio-"nem vel remissionem criminis (ut superius notatum in præcedente "titulo 214), obtinebit actor restitutionem petitum."

1846.
SEAVER v. SEAVER.

The same doctrine we find laid down in all the practical writers, including Poynter, the last among them. See p. 245 of Poynter, where he says:—

"A plea in bar to a suit for restitution may be defeated (as if it "were originally a suit for divorce) by a counterplea, alleging condona- "tion, *compensation*, etc.; which, if established, would (it is presumed), "by placing the parties on their original ground, entitle the party "praying a restitution to the benefit of the sentence prayed."

But it is objected that there is no precedent for such a replication. It is true, none such has been been cited, and I believe there is none that can be produced. It might be enough to say that the proceeding is grounded on principle, and sanctioned by all the writers upon ecclesiastical practice.

But though there be no case directly on the point, there are some, and those modern cases, of high authority, in which the principle of compensation to the extent applied in this case seems to be directly recognized. I shall cite only two, viz.:—first, *Proctor* v. *Proctor*, before Lord Stowell, 2 Hagg. Consist. 297.

[The judge here read passages from Lord Stowell's judgment.]

It is impossible to read these passages, and not to see that Lord Stowell's opinion was against the *medius status* contended for by the appellant here.

Secondly, *Anachini* v. *Anachini*, 2 Curt. 219, before Dr. Lushington.

Dr. Lushington, in that case, says, "I next look at the consequences "of such a principle of law," viz., that a wife having condoned her husband was thereby licensed to commit adultery. "If a husband be "not entitled to a separation from his wife, he is bound to cohabit with "her; and how difficult would it be to enforce *such a principle of law!* "I know no authority which states that, whatever be the guilt of both "parties, if the Court does *not* pronounce for separation, they are not, "according to the law of this country, bound to live together. And I "think such a principle would be dangerous to society and public "morals." See also Lord Stowell's judgment in *Beeby* v. *Beeby*, 1 Hagg. 790.

The common law cases cited by the appellant's counsel in support of the doctrine of a *medius status*, in the relation of husband and wife, are outside the argument. These all recognize the jurisdiction—the exclusive jurisdiction—of the Ecclesiastical Courts on the subject of divorce and of restitution; and, although there may be some incautious

language in some of them, they assume to act upon the same principles as the Ecclesiastical Courts do; I therefore pass these cases by.

But, again, it has been urged that, in such a case as the present, when the parties appear to be *in pari delicto*, the Ecclesiastical Court should act in analogy to the principles of a Court of Equity, which, as between *participes criminis*, will not interfere for either party against the other.

But I should say, first, that the rule, even having regard to the practice of a Court of Equity, is laid down too broadly. It is by no means a universal rule.

The advocates around me (many of whom are practitioners in the Court of Chancery) know that the Courts of Equity will, even at the suit of a guilty party, give relief whenever a principle of public policy requires their interference; in a large department of these Courts they are but auxiliary to the Courts of Common Law, and in the class of cases referred to they leave the parties to their legal rights. The Court Christian acts upon a totally different principle; its interference is *pro salute animarum*.

Having the sole cognizance of questions of marriage, its rights and its duties, so long as the relation of husband and wife subsists, it will protect those rights and enforce those duties. It acknowledges no *status* which is founded upon a violation or relinquishment of those rights and duties. The rights of one party may be forfeited by crime, and the other party thereby be released from conjugal duties, and in such cases the Court Christian will protect the injured party by its sentence of divorce *à mensâ et thoro;* but it will not tolerate the principle that either mutual crime or mutual compact can release or suspend the obligation of the marriage vow. If there be mutual faults, the parties (in the language of Lord Stowell) "may live together, and find "sources of mutual forgiveness in the humiliation of mutual guilt."

We were pressed with the inconvenience of the doctrine upon which this case has been ruled, and, no doubt, serious inconvenience may result from its application to particular cases; but, on the other hand, I think I can see still greater inconvenience from holding the doctrine contended for by the appellant.

I can suppose the case of a man receiving a large fortune with his wife;—I can suppose that man to become an abandoned adulterer, and designedly to seduce his unhappy partner to imitate his profligate courses;—I can suppose him to abandon his yet innocent partner, and to leave her in such circumstances as would require more than common

1846. SEAVER v. SEAVER.

prudence and propriety to save a female from falling. Shall the lapse of the unfortunate party, under such circumstances, consign her to infamy and destitution, and shall the profligate seducer have the legal sanction of the Court Christian to set his unhappy wife at defiance, enjoy the property acquired by the marriage, and leave his victim to pine in helpless destitution and dishonour?

I put an imaginary case; let me not be understood as applying it to the parties before us.

I only of the Court am, of course, answerable for the arguments and observations which have fallen from me in the course of this judgment; but I have the authority of my learned brethren for saying that they entirely concur with me in the general principles I have stated, and in the result at which I have arrived.

That result is, that the learned judge below was right; that this appeal must be dismissed with costs; and the cause remitted.

As the opinion of the Court was unanimous, the other members of it did not deliver judgments. The following note of Dr. Longfield's intended judgment is, with his permission, printed:—

DR. LONGFIELD: This is a suit by Mrs. Seaver for the restitution of conjugal rights.

The wife pleads her marriage, her readiness to perform the duties imposed on her by that sacred contract, and she calls upon the Court to compel the husband to perform his part.

To this demand the husband puts in a defensive allegation, not denying his marriage, nor pretending that he is willing to discharge his duties as a husband, but alleging that she has committed adultery, and has thus relieved him from the obligation of cohabiting with and maintaining her.

To this the wife has replied by a formal denial of her guilt, and by an allegation that, even if she is guilty, her husband also has committed adultery, and that, therefore, neither can justly reproach the other with that offence of which they have both been equally guilty.

The husband objects to this allegation, and has appealed from the sentence of the Consistorial Court of Dublin, which was in favour of its admission.

I am of opinion that the sentence of the Court below should be affirmed, and that the same pleadings which are sufficient to protect the wife against a divorce, when the husband seeks it by lawful process,

will equally protect her against a divorce imposed by the husband without any process of law. It is on both sides admitted that the precise point now in dispute has never been the subject of direct decision, and, as is usual in such cases, each party relies upon that absence of precedent, and wishes to throw upon the other side the *onus* of producing a case in point, when it is confessed that a case in point cannot be found. In the absence of precedent, we must have recourse to principle and analogy, and inquire against which side the charge of novelty may be most fairly brought. First, then, and in a case of this nature, it is a matter of some moment, and adds force to other arguments, I find that all the text-writers are unanimous on the point that the pleading ought to be admitted. In Clarke's 'Praxis,' written about the year 1590, tit. 116, the doctrine is thus stated, speaking of a suit for restitution against which adultery has been pleaded:—"In hoc tamen "casu, si pars actrix replicaverit et probaverit compensationem vel "scientiam, condonationem vel remissionem criminis, ut superius no-"tatur in proximo præcedente titulo, obtinebit actor restitutionem "petitam." Oughton lays down the same rule in the same words, and Consett and Poynter give the same account of the law applicable to the present case.

It is difficult to believe that, if the doctrine thus laid down was contrary to law, and so flagrantly mischievous as it has been represented by the advocates for the appellant, it could have remained without qualification or contradiction, though proclaimed in those text-books which have been the subject of constant reference for a period of more than two hundred years.

An attempt has been made to diminish the force of this authority by alleging that the authors in question merely adopted the rule of the Canon Law, without inquiring whether the same rule had been introduced into the English Ecclesiastical Law: an improbable and unsatisfactory statement, for, although the substance of the law is the same, yet the language bears no similarity to that in which the same doctrine is expressed in the most authentic sources of the Canon Law; and it is not very probable that the Proctors practising in the Ecclesiastical Courts should derive their doctrine from the old Canon Law, of which they, probably, had very little knowledge or regard, rather than from the decisions and opinions with which they were likely to meet in their daily practice.

It is also intimated, on behalf of the Appellant, that the doctrine of the Canon Law was misunderstood, and is applicable merely to the case

1846. SEAVER v. SEAVER.

in which the bishop, *ex officio*, interfered to compel the parties to live together, and not to the case where one party brings a suit for restitution against the other. I do not think there is any ground for this distinction. See the Decretals, lib. v., Dis. xvi. cap. 6 and 7, where restitution in case of mutual guilt is ordered. The sixth chapter certainly refers to a restitution sought by the wife. The words are, "Prædictum virum sibi restitui postulavit;" and in cap. 7, "Super "quo tibi respondimus, quod cum paria crimina mutuâ compensatione "deleantur, vir hujusmodi fornicationis obtentu suæ uxoris nequit con- "sortium declinare;" and in the gloss on this chapter it is observed, "Et sic nota quod compensatio admittitur in delictis, et hoc intelligunt "quidam quoad exceptionem et *replicationem* aliter nunquam."

Now the replication of such a fact could only occur in a suit for restitution, as it does in the present case; and the gloss, in an endeavour to reconcile conflicting opinions respecting the effect of adultery committed by the husband, after he has obtained a divorce for adultery committed by his wife, comes to this conclusion, "Quod illa "possit petere virum, non obstante sententiâ, quia vir illi sententiæ "renuntiavit;"—that she may maintain a suit for restitution, notwithstanding the divorce, since the husband, by his subsequent adultery, has waived that sentence. I may observe here that, in modern practice, a decree for a divorce does, in terms, impose upon the party who obtains it the obligation of leading a chaste life.

I need not cite any further passages from the ancient Canon Law, because I do not think it possible to raise any reasonable doubt on this part of the case; and I turn to the assertion on which the advocates for the appellant appear to place more reliance, viz. that there is no proof that this portion of the Canon Law was ever recognized as of authority in England. On this point of the case, that unanimity among the text-writers to which I have alluded must be considered as of some importance. The rule has been recognized by judges as well as text-writers; for, although a pleading like the present did not come directly before Sir William Scott, yet he has taken occasion to express his opinion, and no authority can be higher in its favour. He repeatedly expressed his opinion to be, that unless a husband is entitled to a divorce, he is bound to cohabit with his wife, and that a husband who is guilty of adultery is not entitled to a divorce. Thus, in *Forster* v. *Forster*, 1 Hagg. Cons. 144, he described a suit for a divorce as a "prosecution "brought by the husband against the wife to be relieved from the obli- "gation of cohabiting with her, by reason of her adultery;" he ex-

plains the doctrine of *compensatio criminis* as it obtained in the Civil Law; and, although it could not there apply to a suit for divorce or restitution, since a husband could divorce his wife without any cause, yet he gives an instance of its application to a suit by the wife for her dower or portion, which was exactly analogous to a suit for restitution of conjugal rights, as it was the remedy provided by the Civil Law for an innocent wife rejected by her husband. It was, in fact, a suit for restitution of conjugal rights, with this only difference, that the conjugal rights of the wife were not as extensive as they became under the Christian code. Her legal conjugal rights consisted of dower, instead of cohabitation. To such suit her adultery was a sufficient answer, as it is to a modern suit for restitution; but to this answer an allegation that the husband also had committed adultery was a sufficient reply.

It is not possible, if the same replication, relying on the *compensatio criminum*, was not admissible in the analogous modern suit, that Sir William Scott could have omitted to notice the difference, and to state that all the text-writers were mistaken in supposing it admissible in a suit for restitution. On the contrary, he cites this as an example of the *compensatio criminis*, which he states was, in the Civil Law, not applied to cases of divorce merely, because the subject itself was not within the jurisdiction of the magistrate, and he adds:—"The Canon "Law, therefore, which attributed to the ecclesiastical magistrate the "question of divorce, carried this principle along with it, for the exer-"cise of his authority" (1 Hag. Cons. 148). Could the Judge have uttered these words without qualification, if he was opinion that the doctrine of compensation was introduced only to half its extent, and did not apply to cases of restitution, and that all the text-books had fallen into the mistake of applying it to such suits? And he adds, "that, in the case of Lord and Lady Leicester, this was unanimously "recognized by all the delegates as the standard Canon Law of this "country in all cases of divorce, and so in all other cases."

This language is plainly applicable to the present pleading, if we bear in mind that the instance which Sir William Scott had just cited was one in which the doctrine of *compensatio criminum* was applied to support a suit, not to resist one.

Again, in *Forster* v. *Forster*, he treats the refusal of a divorce as equivalent to a decree for restitution; and he adheres to the same rule, notwithstanding the danger of a spurious offspring, and the other inconveniences alluded to by the advocates of the Appellant in this cause, as consequent upon a decree for a restitution, and even although

1846.
SEAVER v. SEAVER.

he appears to have taken an exaggerated view of those inconveniences. He says:—"In the state of separation, whether authorized or merely "conventional, which usually takes place, there is, certainly, the in- "creased danger of a spurious offspring; and as the regulations of pro- "perty exist among us, the danger of separate debts, to the great even- "tual injury of the husband and his legitimate family. But even if "such mischief may be presumed to follow the modern application of "the rule, this Court still remains under the legal obligation of adhe- "ring to it until a competent authority provides another. Whether "the inconveniencies of the rule, as it now operates (considered, as they "ought to be, in opposition to those which might follow from the re- "versal of it), are such as, nevertheless, ought to produce a reversal, is "a question which this Court has neither the power nor the will to "entertain."

The same doctrine is recognized by a very high authority in the case of *Anachini* v. *Anachini*, 2 Curt. 219. Dr. Lushington says:—"If a "husband be not entitled to a separation from his wife, he is bound to "cohabit with her; and how difficult would it be to enforce such a "principle of law! I know no authority which states that, whatever "be the guilt of both parties, if the Court does not pronounce for a se- "paration, they are not bound to live together; and I think such a "principle would be dangerous to society and to public morals." Could Dr. Lushington have used this language if he adopted the appellant's view of the law—that, in a case of mutual guilt, the husband might dismiss his wife; and, if the Common Law would not compel him to support her while living apart from him, neither would the Ecclesiastical Law compel him to receive her into his house?

It is scarcely possible to read the numerous cases which have been decided on the subject of divorce without arriving at the conclusion that, in every contingency, either one party is entitled to a divorce, or the other party is entitled to a restitution. There is no middle course. A divorce obtained by the husband does not compel him to live separate from his wife; it merely permits him to do so; and the law which, under certain circumstances, refuses to permit him to live separate, must in consistency be prepared to compel him to receive her. Indeed there is authority for holding that, in an unsuccessful suit for a divorce, the Court, as a consequence, may order the unsuccessful party to return to cohabitation: *Moore* v. *Moore*, 3 Mo. P. C. Cas. 86, referred to in *Clowes* v. *Clowes*, 4 No. Ca. 29.

In order to support the doctrine that there is a middle case, in which

the Court will refuse relief to either side, the Appellant's advocates have compared the doctrine of this Court to that of a Court of Equity, which requires a plaintiff to come into Court with clean hands, and, in certain cases, will refuse to interfere on either side, either to rescind a contract or to enforce it, but leaves the matter to the Courts of Common Law, *i. e.* to the Courts of ordinary jurisdiction.

But such neutrality is not allowed to this Court, which has the exclusive jurisdiction, and fills the place both of the Courts of Common Law and of the Courts of Equity, in relation to the subject of this suit. The Common Law right is, that the parties should live together, as the effect of the valid marriage contract, against which no objection has been raised. The decree for a divorce is an extraordinary equitable relief. The analogy to the practice of the Courts of Equity is preserved by the rule which, in this case, would deny relief to either party praying for a separation.

The appellant has referred to the state of the law on some collateral points, to which I shall briefly refer. First, it is observed, that the wife who abandons her husband for an adulterer is not entitled to dower on her husband's death, and that the husband's adultery could not be set forth in a replication to support the wife's right to dower. I cannot draw any inference from this to bear upon the case before us. The loss of dower is a punishment imposed on the wife by statute. It has nothing to do with the Common Law; and, on the other side, it is equally irrelevant, that her adultery will not disentitle her to the jointure provided for her by her marriage settlement; nor to a share of her husband's assets, under the Statute of Distribution.

The manner in which the Common Law treats the adulteress during the life of the husband may appear to have more bearing on the question now before the Court; and cases have been cited on behalf of the Appellant, to show that, in a case like the present, the husband would not be liable to tradesmen for necessaries supplied to his wife; that he was not bound to support her; that he might let her starve, or be dependent on public or private charity for a subsistence. This state of the Common Law would furnish a conclusive argument for the interference of the Court Christian in the present case. The husband is entitled to the use and disposal of all the common property, whether derived through his wife or himself; he may take possession of all her goods, live in her hereditary mansion, consume the rents of her freehold property, and even sell her chattel interests in land; and, while living in splendour and profligacy on her estates, may refuse a single

1846. SHAVER v. SHAVER.

shilling to pay for or purchase a meal to save his guilty but repentant wife from starvation. This shocks every feeling of justice and humanity, and is most repugnant to the Ecclesiastical Law, which visits with equal condemnation adultery committed by the husband or by the wife, and will secure to the penitent that justice which is denied to her by her profligate husband.

No human judge can look into the recesses of the human heart, but the facts of a case like this furnish no mean proofs of penitence on the woman's part. For what does she desire and demand by this suit? Merely to return to her domestic duties, and to be maintained and protected from want and guilt. For this she is willing to abandon her course of sin, and all the guilty pleasures in which once she took delight, and to place herself within the power and subjection of a man who hates her, because he indulges in a guilty passion for another, and who despises her for having fallen into equal guilt. Can we agree with the appellant that a sentence gives any encouragement to female adultery, which places her within the lawful power of a man, on whose principles she cannot rely, and whose affection or respect she can never hope to possess, without any protection, except from the extremity of violence, without friends, and without society? Her husband's jealousy and the scorn of her own sex condemn her to a life of solitude. In this state of shame and solitude, the sentence of the Ecclesiastical Court can give her nothing except a mere subsistence and a refuge from further sin.

I cannot concur in the apprehensions which have been expressed of consequences fatal to domestic happiness or female purity from a decision in the wife's favour, while a decision against this pleading would hold out absolute impunity to a husband's guilt. Where both parties are guilty, the punishment will fall upon both; and even if the judgment does not prevent some of the evil consequences from falling upon innocent parties, those consequences must, in fairness, be attributed, not to the judgment, but to the sin of adultery, which, perhaps more than any other sin, entails disgrace and damage, not only on the guilty parties themselves, but on their innocent children and relations also—

> "Hoc fonte derivata clades
> In patriam populumque fluxit."

The danger to the innocent relations, which may arise from the claims of a spurious issue, is rather diminished than increased by a decision in favour of the wife. It is impossible to be blind to the fact

that, in such a case as this, a suit for restitution must have been brought, more in the hope that it may secure a maintenance to the wife than a return to cohabitation; but whether the result be a return of the wife, subject to the authority and control of her husband, or an amicable arrangement by which the parties may live totally separate, there is obviously less danger of the birth of a spurious issue, under such circumstances as might enable it to claim the privileges of legitimacy, than if the Court refused to grant a divorce or restitution to either party.

The latter decision would enable the wife to live where and how she pleased. She might lawfully enter her husband's house whenever she could; she might destroy his property, and haunt his person, and conduct herself in such a manner as to make it impossible for the husband to be supplied with legal evidence to disprove the claims of her illegitimate offspring. How much more favourable is the decree which orders the parties to go and sin no more! A sentence for restitution will operate as a mutual condonation and compensation of all past offences, and restores the parties to their original matrimonial rights and duties. If either party shall commit adultery after a decree for restitution, the other party may apply for a divorce. The sentence is not merely that the parties shall live together, but its effect in substance is, that they shall fulfil all their matrimonial duties, of which fidelity to the nuptial bed is not the least important. I know that, according to the modern code of morals and feelings, it is hard for the husband to comply with such a sentence. According to this code, a husband incurs no disgrace, and need feel no shame for his own adultery, while his honour is ruined totally by the adultery of his wife. The disgrace thus caused by another's guilt is capable of only one possible aggravation, viz. *if he forgives her*. This code cannot be recognized in a Court Christian; nor will a man, against whom adultery is charged and proved, be permitted to allege any reluctance to associate with an adulteress, because she happens to be his wife. I have assumed the pleadings to be true for convenience; but it may turn out in evidence that both parties may be innocent, and I have applied myself to it, therefore, as if it was a case of mutual guilt. I do not consider it to be necessary to make any observations on the formal objections made to the pleadings, as they have not been argued by either party.

APPENDIX III.

25 & 26 VICT. c. 81.

An Act to make perpetual An Act to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes.

[7th August, 1862.]

WHEREAS an Act passed in the session of Parliament held in the twenty-third and twenty-fourth years of the reign of her Majesty, chapter one hundred and forty-four, and intituled "An Act to amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes," is about to expire; and it is expedient to make the same perpetual: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

23 & 24 Vict. c. 144.

Recited Act made perpetual.

1. There shall be repealed the eighth section of the said Act, whereby it is provided that the same is to continue in force until the thirty-first day of July, one thousand eight hundred and sixty-two, and no longer, and the said Act shall be and is hereby made perpetual.

INDEX TO THE PRINCIPAL MATTERS.

INDEX TO PROBATE CASES.

ADMINISTRATION.

1. *Administration to Attorney of Administrator-General of Guiana.—Domiciled Resident in British Guiana.—Local Law.*

B., having acquired a domicil in British Guiana, died a bachelor and intestate, without any known relations there. Under an ordinance of that colony the Administrator-General took possession of B.'s property in that colony, and appointed Messrs. P., F., and P., of Liverpool, to be his attorneys, and in his name to obtain letters of administration to the personal estate of the deceased in this country. The Court, after the usual notice to the Queen's Proctor, and citations of next of kin, made the grant accordingly.—*In the goods of John O'Brien* (deceased), 604.

2. *Administration to Attorney.—Person entitled to Grant resident in England.*

Where the person solely entitled to a grant of administration and to all the personal estate of the deceased was resident in this country, and able to take the grant himself, the Court declined to decree it to his attorney for his use and benefit.—*In the Goods of Eleanor Burch* (deceased), 139.

3. *Administration to Creditor.—Secretary of an Association.*

Where an application is made for the grant of administration to the secretary of an association, on the ground that the deceased was indebted to the association, the Court ought to have such information of the constitution of the association as would show that the secretary can be treated as a creditor.—*In the goods of Thomas Fairweather* (deceased), 588.

4. *Joint Grant to a Widow and to a Person entitled in Distribution refused.—21 Hen. VIII. c. 5, s. 3.—Probate Act, s. 73.*

The Court is precluded by 21 Hen. VIII. c. 5, s. 3, from making a joint grant of administration to a widow and one of the persons entitled in distribution, even with the consent of the next of kin and of all the other persons entitled in distribution; and the 73rd section of the Probate Court Act does not enlarge the power of the Court in such a case.—*In the goods of James Browning* (deceased), 634.

ADMINISTRATION—*continued.*

5. *Limited Administration* ad colligenda bona.—*Power of Administrator.*

The Court, under special circumstances, made a grant to a creditor *ad colligenda bona*, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises, which would expire before a general grant could be made. The Court refused to include in the grant a power to dispose of the lease and goodwill of the business, or a power to carry on the business.—*In the goods of Charles Clarkington* (deceased), 380.

6. *Limited Grant to substantiate Proceedings in Chancery.—Will.—Compromise.—Failure to carry out Terms.—Bill in Chancery.*

D. propounded the will of E., which was opposed by H., one of the next of kin of E., and certain issues in the suit came on for hearing before the Court and a special jury. Before the jury were sworn, certain terms of compromise were signed by counsel on behalf of both parties; one of which terms was that a Scotch confirmation of the will brought into this Court by D. should receive the seal of the Court. (See 21 & 22 Vict. c. 56, s. 12.) Subsequently, the parties being unable to agree as to the meaning and effect to be given to the terms of compromise, D. moved to have the confirmation sealed and delivered out to him: the Court refused to give effect to one of the terms of the compromise, the parties being unable to agree as to the rest, but held that D. was entitled to take out the confirmation unsealed. H. then filed a bill in Chancery for administration of E.'s estate, etc.; a demurrer to this bill for want of parties was allowed. The estate of E. was also alleged to be vested in trustees by a sequestration under the Scotch Bankruptcy Acts. H. now moved for administration with the will annexed, *pendente lite*, or for administration limited to substantiate the proceedings in Chancery; and the Court held that the nominee of H. would be entitled to a grant of the latter description.—*Viscountess Hawarden* v. *Dunlop*, 614.

7. *Limited Grant under* 38 *Geo. III. c.* 87, *and Probate Acts.—Executor out of Jurisdiction.—Personal Representative of Legatee.*

The Court will make a limited grant to the personal representative of a legatee, the executor being out of the jurisdiction, though the legatee only is mentioned in 38 Geo. III. c. 87.—*In the goods of Thomas Collier* (deceased), 444.

8. *Administration to Mortgagee of an Interest under the Will.*

E. G. being a married woman, and having an interest under her father's will expectant on the death of his widow, joined with her husband, in 1841, in executing a mortgage of such interest to B., to secure a running account. E. G. died in 1851, and her husband in 1853, neither possessed of any other property. On the death of her father's widow, a representative of E. G. was required to release the trustees; B.'s debt being larger than E. G.'s interest under the will, the Court granted administration to the goods of E. G. to B.—*In the goods of Elizabeth Godfrey* (deceased), 133.

ADMINISTRATION—*continued.*

9. *Grant to Party next entitled.—Renunciation of next of Kin solely entitled.*

In case of an intestacy, where the persons who are sole next of kin and the only persons entitled in distribution renounce their title to administration, the Court will make the grant to a person who would have been next of kin if the sole next of kin had been out of the way, although such person has no interest.—*In the goods of George Johnson* (deceased), 595.

10. *Administration under 73rd section of Probate Act.—Practice.*

(1) *When a Grant has been made under 73rd Section. Presumption of Death.—Immediate Grant.*

Where a person was presumed to be dead (not having been heard of for seven years), intestate, and his father who, when he was last heard of, was his sole next of kin, also died during the seven years, the Court granted administration of his effects, under the 73rd section of the Probate Act, to the person who was his next of kin at the expiration of the seven years, without requiring an intermediate grant to be taken out of the effects of the father.—*In the goods of Charles William Peck* (deceased), 506.

11. *Presumption of Death.—Grant of Administration to Mother of Deceased under the 73rd section of the Probate Act.*

When the father of the deceased had deserted his wife twelve years ago and gone to Australia, and had not been heard of for seven years, the Court refused to presume that he had died at any given period within the seven years; but, under the circumstances, granted administration of the effects of his son, who had died within the seven years, to the mother, under the 73rd section of the Probate Act, without requiring her first to take out administration to the father.—*In the goods of William George Smith* (deceased), 508.

12. *Limited Grant of Administration under 73rd Section of Probate Act.*

A son, being entitled to the whole of the personal estate of his father, deceased intestate, wrote from Madras, where he was serving in the Royal Artillery, to a cousin in England, giving him certain directions as to securing the amount of the property, and transmitting a small sum to him. The Court granted administration, under the 73rd section of the Probate Act, to the cousin, for the use and benefit, etc., limited to carrying into effect the directions contained in the said letter.—*In the goods of Job Drinkwater* (deceased), 611.

(2) *When the Grant will not be made under the 73rd section.*

13. *Section 73rd of Probate Act.—Creditor.*

The Court will not make a grant of administration under the 73rd section of the Probate Act to a party entitled to a grant in another character. The Court declined to make a grant *de bonis non* with the will annexed, under the 73rd section, to a creditor, without citing certain residuary legatees named in the will, who were resident in Australia.—*In the goods of Thomas Fairweather* (deceased), 558.

ADMINISTRATION—*continued.*

14. *Section 73rd of Probate Act.—Special Circumstances.—Property not perishable.*

Where a mother died in England intestate, leaving two children resident in Georgia, the only persons entitled to her effects, having money in the funds and in the savings-bank, a small sum due to her, and a little furniture, the Court refused to make a grant to B., her nephew, for the use and benefit of her children, although communication with her children from England was cut off by reason of the blockade of the southern ports of the States, on the ground that the property was not perishable, and that there were no special circumstances to justify the Court in departing from the ordinary practice.—*In the goods of Sarah White, Widow* (deceased), 457.

15. *Purchaser of a Debt of an Assignee appointed in Paris to the Estate of an Insolvent intestate.—Application for Limited Grant refused.*

D. died in Paris, intestate and insolvent, in February, 1859. On petition of his widow, the Tribunal of Commerce of the Seine, in October, 1859, declared the estate bankrupt, and appointed B. assignee, who, under a further decree, proceeded to sell the debts due to D.'s estate by auction. C. purchased the debts, among which was one due from F., of Lombard Street, London. By the law of France C. would be entitled to sue there for the recovery of such debts in his own name. On motion to grant administration to the attorney of C. of D.'s estate, limited to the debt due from F., on the suggestion that a personal representative of D. was necessary to sue in this country for the debt due from F., the Court rejected such motion. Semble, first, the title to the debt vested in C. by the law of France would enable him to maintain a suit in this country; secondly, there is no authority for granting administration to the purchaser of any part of the deceased's estate after his death.—*Depit and Chapot* v. *Delerieleuse*, 131.

16. *Administration* de bonis non *with Will annexed.—Renunciation of Executors and Residuary Legatees in Trust.—Substituted Residuary Legatee.*

B. appointed C. and D. executors and residuary legatees in trust, his widow residuary legatee for life or widowhood, and C., D., E., F., and G. substituted residuary legatees. C. and D. renounced probate and administration as executors and residuary legatees in trust, and letters of administration, with the will annexed, were granted to the widow: she died, leaving part of the estate unadministered. The Court refused to allow C. to retract his renunciation as residuary legatee in trust, but granted him administration *de bonis non* as substituted residuary legatee.—*In the goods of Robert Morrison the Elder* (deceased), 129.

17. *Administration to Residuary Legatee.—Executors unable to take Grant by Practice of Isle of Man.—Isle of Man Grant.*

In the Isle of Man, officers called "Sumners" are appointed in each parish by the bishop of the diocese, whose duty it is (*inter alia*) to take upon themselves grants of administration, with the wills annexed, in the event

ADMINISTRATION—*continued.*

of executors refusing to act, or being unable to give security to the Ecclesiastical Court of the diocese. A. died in the Isle of Man, leaving a will, whereof he appointed executors. The executors being unable to give security to the Ecclesiastical Court of the diocese, administration with the will annexed was then granted to B., Sumner for the parish in which A. died. The executors having been cited and not appearing, the Court, upon an affidavit as to the circumstances under which the grant was made to B., and upon B.'s consent being filed in the Registry, granted administration with the will annexed to the residuary legatee.—*In the goods of Charles Whiston* (deceased), 318.

ADMINISTRATION BOND.

1. *English and Irish Property.—Administration originally granted in England.—Security required.*—20 & 21 *Vict. c.* 79, *s.* 94.—22 & 23 *Vict. c.* 31, *s.* 25.

Where a testator died, leaving personal estate in England and personal property in Ireland, and an administration was granted in the Court of Probate in England of the property in England, sworn under £2000, with a bond to cover such property, the Court subsequently ordered that on a bond being given in the penal sum of £120,000, and its being noted on the letters of administration, that the deceased's personal estate in Ireland had since been sworn under £60,000 and the security given accordingly, one of the registrars should issue a certificate that a bond had been given to the Judge of the Court of Probate to cover the property in Ireland as well as in England.—*In the goods of John Morney Potts* (deceased), 5.

2. *Penalty of Bond in Nominal Sum.—Administration to execute a Release to Trustees.*

Where letters of administration were granted merely to enable a personal representative of the deceased to execute a formal release to the trustee under a marriage-settlement, the Court allowed the property to be sworn under £20.—*In the goods of Hugh Stacpoole* (deceased), 316.

3. *Sureties dispensed with.—Fund in Court of Chancery.—Administration.*

Where the unadministered estate of a testator had been transferred to the Accountant-General of the Court of Chancery, and a bill had been filed praying for it to be administered by that Court, the Court decreed a grant *de bonis non* to the residuary legatee for life, without requiring her to find sureties to the administration bond.—*Cleverly and Another* v. *Gladdish*, 335.

4. *Sureties dispensed with.—Poverty of Administrator.—Fund in the Court of Chancery.*

The Court made an order to dispense with the usual sureties to an administration bond, to be entered into by A. B., who was beneficially entitled to a fund which had been paid into the Court of Chancery, and for which the administration was required, it appearing that A. B. was, in consequence of sickness, in great poverty, and unable to induce any of his re-

ADMINISTRATION BOND—*continued.*

latives or friends to become sureties to the bond.—*In the goods of Louisa Maria de la Farque, widow* (deceased), 631.

ADMINISTRATION PENDENTE LITE.

Interest Suit.—Receiver in Suit in Chancery in respect of same Estates appointed Administrator pendente lite.

In an interest suit between the Queen's Proctor and a defendant asserting himself to be the lawful nephew of a deceased intestate, the Court appointed A. B., who had been made receiver in respect of the same estates in proceedings in Chancery, to be administrator *pendente lite*, on his affidavit that the estates in certain particulars would be benefited by being dealt with by a person clothed with such authority, and on consent of the parties to the suit.—*Her Majesty's Procurator-General* v. *Williams*, 353.

AFFIDAVIT.

1. *Addition of Deponent.—Affidavit sworn in America.*

An affidavit sworn in America, in which the addition of the deponent was not inserted, was not allowed to be read in the Court of Probate.—*In the goods of William Henry Bernard*, 489.

2. *Affidavit.—Interlineation.—Description of Deponent.—Rule* 58, *Non-contentious Business.*

Where an affidavit for administration had been sworn in New Zealand containing certain interlineations respecting the residence of the deponent, which were not initialed by the judge who administered the oath, and the description of the deponent as worded was slightly irregular, the Court made an order (under Rule 58, N. C. Business) that such affidavit should be filed.—*In the goods of William King*, 621.

3. *Affidavit in Foreign Parts.—Power to administer Oaths.*—18 & 19 *Vict. c.* 42, *s.* 31.

Where an affidavit is sworn in foreign parts before a person not authorized to administer oaths by 18 & 19 Vict. c. 24, it must appear that none of the persons authorized by that Act to administer oaths were resident in such place.—*In the goods of William Henry Bernard* (deceased), 489.

ATTACHMENT.

1. *Husband's liability for Wife's Costs.—Terms of Order.*

Where a suit was commenced by a married woman, whose husband afterwards became a party to it (the declaration being filed in their joint names), and the Court had made an order for the payment of the costs on the wife alone, which was served on both of them, an attachment was granted against the husband (he having notice of the motion) for the non-payment of those costs.—*Thomas* v. *Crowther*, 503–4.

2. *Married Woman.—Administratrix.—Refusal to file Inventory.*

A married woman may be attached for non-compliance with a citation calling upon her to file an inventory in the registry of an estate of which she is administratrix.—*Baker* v. *Baker*, 380.

3. *Married Woman.—Costs.—No separate Property.*

A married woman who has been condemned in costs is not liable to be attached for the non-payment of them where there is proof that she has

ATTACHMENT—*continued.*
no separate property.—*Harris and Another* v. *Bradbury and Halliday*, 459.

ATTESTATION CLAUSE.
Signature of Testator.
Deceased read over an attestation clause containing his name, written by himself, in the presence of two witnesses, who subscribed their names. Deceased then, on the opposite page of the paper, wrote some words, beneath which he added, "Attestation. John Walker, testator," and the names of two executors. Held, that the deceased intended to give effect to his will by the signature of his name in the attestation clause.—*In the goods of John Walker* (deceased), 354.

BANKRUPTCY OF DECEASED.
See *Administration*, 15.

CITATION.
1. *Certificate of Service.—Indorsement.*
When a citation has been served, a certificate of service should be indorsed on the citation.—*Goodburn* v. *Bainbridge and Others*, 4.
2. *Minor.—Guardian.—Affidavit of Service.*
An affidavit that a minor was served with a citation in the presence of A., his guardian, should go on to show how A. became his guardian.—*Johnson* v. *Weldy*, 313.
3. *Minor in Service.—Service of Citation.*
Where a minor of the age of seventeen was living in service at a distance from her mother, her natural guardian, the Court dispensed with the ordinary rule, which requires service of a citation upon a minor to be effected upon her in the presence of her natural or legal guardian, or of some person upon whom her custody for the time being properly devolved.—*Lainson* v. *Naylor*, 7.

CODICIL.
1. *Citation of Parties interested under Codicil.*
Where the executors of a will object to prove a codicil to that will, on the ground that they do not believe it to be a valid one, they should proceed to prove the will in solemn form, and cite the parties interested under the codicil to see the will proved, to give them an opportunity of propounding the codicil.—*In the goods of William Benbow* (deceased), 488.
2. *Conditional Codicil.*
A codicil expressed to take effect only upon an event which does not happen, republishes a will, to which it refers by date, and is on that ground entitled to probate.—*In the goods of Solomon Mendes Da Silva* (deceased), 315.
3. *Codicil dependent on Will.—Effect of Destruction of Will.—Intention of Testator.*—Onus Probandi.
A codicil is *primâ facie* dependent on the will. Where a will and codicil to it have been in existence, and the will has been subsequently destroyed by the testator, the burden of proof is on the party setting up the codicil,

CODICIL—*continued.*

to show that it was the intention of the testator that it should operate separately from the will; otherwise the presumption is that by the destruction of the will the codicil was revoked.—*Grimwood* v. *Cozens and Others*, 365.

COMPROMISE.

1. *Will.—Compromise.—Failure to carry out Terms.—Bill in Chancery.—Limited Grant to substantiate Proceedings in Chancery.*

D. propounded the will of E., which was opposed by H., one of the next of kin of E., and certain issues in the suit came on for hearing before the Court and a special jury. Before the jury were sworn, certain terms of compromise were signed by counsel on behalf of both parties; one of which terms was that a Scotch confirmation of the will brought into this Court by D. should receive the seal of the Court. (See 21 & 22 Vict. c. 56, s. 12.) Subsequently, the parties being unable to agree as to the meaning and effect to be given to the terms of compromise, D. moved to have the confirmation sealed and delivered out to him: the Court refused to give effect to one of the terms of the compromise, the parties being unable to agree as to the rest, but held that D. was entitled to take out the confirmation unsealed.—*The Viscountess Hawarden* v. *Dunlop*, 614.

2. *Executors.—Issues tried before Judge of Assize.—Compromise.—Rule of Nisi Prius.—Probate.*

Where on trial before a Judge of Assize and a jury, of issues relating to the validity of a will, certain executors of which were plaintiffs, and certain other executors of which were defendants, in the suit, verdict was taken by consent for the plaintiffs on an agreement made an order of *nisi prius*, one of the terms of which was that the executors defendants should renounce probate, the Judge of the Court of Probate refused to make the order of *nisi prius* a rule of the Court, on the ground that the Court of Probate could not properly enforce an agreement that any executors of a will should renounce probate thereof, but granted probate to the executors plaintiffs.—*Hargreaves and Others* v. *Wood and Others*, 602.

CONDITION.

1. *Will.—Conditional.—Evidence of Adherence.*

B. wrote a testamentary paper in January, 1859, "should anything happen "to me on my passage to Wales, or during my stay." He returned in about a week, and died in October of the same year, the will remaining in his writing-desk, and having been alluded to by him after his return. The Court held, that the paper was in terms conditional, and that since the Wills Act no evidence of "adherence" is admissible.—*Roberts* v. *Roberts*, 337.

2. *Condition Precedent.—Will.—Evidence.*

Where a will is expressed to take effect during absence on a particular voyage, and the writer returns to England, the Court cannot admit parol evidence to show the writer's intention of adhering to that will during a subsequent absence.—*In the goods of John Moss Winn* (deceased), 147.

CONFIRMATION AND PROBATE ACT, 21 & 22 Vict. c. 56.

1. *Effect of Scotch Confirmation of Executor. — Domicil.—Issues joined in a Probate Suit.*

The finding of the commissary as to a Scotch domicil, under 21 & 22 Vict. c. 56, ss. 9, 12, is conclusive evidence of the fact of domicil for the purposes of that Act only (see sect. 17), *i.e.* for rendering it unnecessary to take an English probate in respect of assets in England; but it has no effect in determining any issues raised in a suit in this Court, which will proceed to try such issues, though a confirmation of the will in question be tendered for the seal of the Court.—*Hawarden* v. *Dunlop*, 340.

2. *Confirmation and Probate Act*, 21 & 22 *Vict. c.* 56, *s.* 12.—*Effect of an Eik, or Additional Confirmation, limited to Personal Estate in England.*

An additional confirmation, granted under section 12 of the Confirmation and Probate Act, 1858, does not apply to an original confirmation granted before that Act came into operation. *Semble:* an additional confirmation, which does not include personal estate in Scotland besides personal estate in England, is not entitled to be sealed with the seal of the Probate Court under the above section.—*In the goods of Colonel Gordon* (deceased), 622.

3. *Confirmation and Probate Act* (1858), 21 & 22 *Vict. c.* 56. *ss.* 9, 12. —*Eik, or Additional Confirmation.—Seal of Court.*

Where an inventory has been recorded in a Commissary Court of Scotland of the personal estate of a person who died domiciled in Scotland, and confirmation has been granted in respect of the same, and afterwards an additional inventory has been recorded of personal estate belonging to the deceased in England, and an eik, or additional confirmation, has been granted in respect of the same, the Court of Probate will not seal such eik, or additional confirmation.—*In the goods of Andrew Wingate* (deceased), 625.

CONSTRUCTION.

1. *Law of the Country of Domicil—French Will.*—Légataire Universelle.

Where a natural-born Englishman died domiciled in France, having made a will in 1843, valid by the law of England, and in which he made A. his residuary legatee, and made another will at Paris in 1848, valid by the law of France, in which he instituted B. his *légataire universelle*, the Court held, that on the face of the instrument, he used the words *légataire universelle* in their primary and legal sense, and that therefore they would be incompatible with the former will, and as to personal property would revoke it.—*Laneuville* v. *Anderson and Guichard*, 41.

2. *Construction.—Residuary Estate.—Tenancy in Common.—Lapse to undisposed Residue.*

A., by his will, bequeathed the residue of his personal estate to be equally disposed of between five of his childern, whom he named. One of those children died in A.'s lifetime. The Court held that the five children took as the tenants in common, and the share of the deceased child having therefore lapsed to the undisposed residue, it granted administration with the will and codicil annexed to B., son of the deceased, not as a legatee,

EVIDENCE.

1. *Allegation of Bastardy.—Claim of Relationship.—Burden of Proof. —Admissibility of Evidence.*

Where an issue is raised between the Crown alleging the bastardy of, and parties claiming to be related to, a deceased intestate, the burden of proof is on the parties setting up the relationship. In such a case evidence of declarations made by a deceased person, other than the deceased in the cause, is inadmissible, unless the relationship is proved *aliunde;* but evidence of declarations made by the deceased in the cause is admissible.—*Dyke (Her Majesty's Procurator-General)* v. *Williams*, 491.

2. *Revocation of Will.—Evidence of Declarations of Deceased after alleged Act of Revocation.*

On an issue as to the revocation of a duly executed will, evidence of declarations of the deceased (to the effect that he had a will, but had destroyed it) subsequent to the date of the alleged revocation, was held to be inadmissible, as falling within the principle laid down in *Doe* v. *Palmer*, 16 Q. B. 747.—*Staines* v. *Stewart and Jones*, 320.

EXECUTION.

1. *Attestation Clause.—Signature of Deceased in Will.*

Deceased read over an attestation clause containing his name, written by himself, in the presence of two witnesses, who subscribed their names. Deceased then, on the opposite page of the paper, wrote some words, beneath which he added, "Attestation. John Walker, testator," and the names of two executors. Held, that the deceased intended to give effect to his will by the signature of his name in the attestation clause.—*In the goods of John Walker* (deceased), 354.

2. *Attesting Witness.—Erasure of Name.—Probate.*

Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and attested, and that subsequently the attesting witness's name had been erased by the testator, and had at his request been rewritten by the attesting witness, the Court, on motion, granted probate to the widow, on affidavit that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children.—*In the goods of Henry Hart Coleman* (deceased), 314.

3. *Attesting Witnesses.—Illiterate Persons.—Pen held.*

The attesting witnesses to a will not being able to write, held the top of the pen while the writer of the will subscribed their names, and the Court held that, as the witnesses took some share in the act of writing, it could not determine on the more or less, and that the attestation and subscription were good.—*Lewis* v. *Lewis* (on motion), 153.

4. *Execution by Mark.—Wrong Name.—Probate.*

A. B. put his mark to a testamentary paper in which he was throughout described as C. B. The Court, being satisfied on affidavit that A. B. duly executed the paper by mark *animo testandi*, granted probate thereof as his will.—*In the goods of Thomas Douce* (deceased), 593.

EXECUTION—*continued.*

5. *Position of Testator's Signature.—Last Clause.—Death of subscribed Witnesses.*

In 1832 B. wrote a will, of which the last sentence concluded with his name. After his death in 1859 the will was produced, with the words, "Witness, "C. D. Witness, E. F. April 11, 1838," written below the signature. On proof of the deaths of C. D. and E. F., and of their handwriting, the Court admitted the will to probate as of the date of April 11, 1838.—*Trott and Trott* v. *Skidmore and Others*, 12.

6. *Signature of Testator on Paper pasted on Will.*

Where a will was written on a piece of parchment, and the testator and attesting witnesses wrote their names on a piece of paper previously pasted on the parchment, held to be a good execution of the will.—*In the goods of John Gausden* (deceased), 362.

EXECUTOR.

1. *Limitation of Time of Executorship.—Executorship according to French Law.—French Domicil.—The appointment by a Domiciled Frenchman in a Holograph Will.*

The appointment of a domiciled Frenchman in a holograph will of an *exécuteur testamentaire* is subject to the rules of the French law, even as respects personal property out of France; and where the French Court had decreed that the time limited by the French law for the execution of such an executorship had passed, and that the executor had no more right to intermeddle in the estate of the testator, and that the parties beneficially entitled were the only persons who had a right to intermeddle, the Court held itself bound by such decree, and refused to grant probate (with respect to personalty in England) to such an executor.—*Laneuville* v. *Anderson and Guichard* (intervening), 24.

2. *Diocesan Grants.—Chain of Executorship.—Bank of England.—20 & 21 Vict. c. 77, ss. 86, 87.*

A grant in a chain of executorship, made by a diocesan court in general terms, and not limited to property within its jurisdiction, is valid under the 87th section of the Probate Act, and entitles the personal representative of an original testator claiming under such grant to the transfer of stock standing in the Bank of England books in the name of the original testator. *Semble:* otherwise, if the diocesan grant were limited in its terms.—*In the goods of Thomas Tucker* (deceased), 123.

3. *Will.—Directions to nominate Executor.—Self-appointment.*

A. B. made her will, concluding "I must beg C. D. to appoint some one "to see this my last will executed;" and the Court granted probate to C. D. on his appointment of himself being filed in the registry.—*In the goods of Ann Hill Ryder* (deceased), 127.

4. Felo de se.—*Executor of.*—Probate.

The executor of the [illegible] coroner's *inquest* is [illegible] verdict *is to work* [illegible] to the *Crown.* [illegible] of a person found *Felo de se* by the verdict of a [illegible] to probate thereof, though the effect of the [illegible] forfeiture of the personal property of the deceased [illegible] is a distinction between the operative effect of

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A. B. made her will, concluding "I must beg C. D. to appoint some one "to see this my last will executed;" and the Court granted probate to C. D. on his appointment of himself being filed in the registry.—*In the goods of Ann Hill Ryder* (deceased), 127.

4. Felo de se.—*Executor of.—Probate.*

The executor of the will of a person found *Felo de se* by the verdict of a coroner's inquest is entitled to probate thereof, though the effect of the verdict is to work a forfeiture of the personal property of the deceased to the Crown. There is a distinction between the operative effect of

EXECUTOR—*continued.*

a testamentary paper and its title to probate.—*In the goods of Eliza Bailey, spinster* (deceased), 156.

5. *Felon.—Conviction of Executor of Felony after death of Testator. —Title to Probate.*

A person appointed executor, and after the testator's death convicted of felony, is not thereby disentitled to maintain a suit in a Court of Probate with a view of establishing the validity of the will by which he is appointed executor.—*Smethurst* v. *Tomlin and Bankes* (on demurrer), 143.

6. *Executor out of Jurisdiction.* *See* LEGATEE.

7. *Inaccurate Language in Will.—Illiterate Testator.—Probate to Two Executors.*

C., by will, left the rest of his property, etc., "unto my wife Betsy Court "and my son Michael Court, as whole and sole executrix;" and the Court held that the widow and son were both entitled to take probate.—*In the goods of Michael Court* (deceased), 485.

8. *Refusal by Executor to produce Probate and Account of Estate to Co-executor.—Citation against Executor.—Practice.*

Where an executor had proved a will (power being reserved to his co-executors to come in and prove it), upon his refusal to produce the probate and an account of the estate in respect of which it had been granted, so as to enable a co-executor to prove the will without payment of probate duty, the Court directed a citation to issue against him.—*In the goods of Augustus Turrell* (deceased), 456.

9. *Surviving Executor Cited and not appearing.—Effect.*—20 *&* 21 *Vict. c.* 77, *s.* 79.—21 *&* 22 *Vict. c.* 95, *s.* 16.

Where an executor, to whom power has been reserved, survives his acting co-executor and does not appear to a citation, the executor, if any, of the acting executor will be the representative of the original testator.—*In the goods of Robert Noddings* (deceased), 15; and *In the goods of Charles Lorimer*, 473.

10. *Executor of surviving Acting Executor.—Executor of Acting Executor.*—20 *&* 21 *Vict. c.* 77, *s.* 79.—21 *&* 22 *Vict. c.* 95, *s.* 16.

On the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased.—*In the goods of Charles Lorimer* (deceased), 471.

11. *Terms of Appointment.—Misdescription.*

Where an aged testator gave instructions that William George, of 4, Finsbury Square, watchmaker, should be his executor, and, on the death of the testator, it appeared that neither he nor his family knew any one of that name, and that no such person could be found or heard of at that address, the Court granted letters of administration, with the will annexed, to one of the residuary legatees, there being no appointment of an executor willing and competent to take probate.—*In the goods of James White Sawtell* (deceased), 448.

EXECUTOR—*continued.*

12. *Terms of Appointment.—Uncertainty.*

B., by his will, left all his property to his three sons therein named, and appointed "A. as my executor, with any two of my sons." A. proved the will at the Cape of Good Hope alone, and two of testator's sons now asked for probate of an authentic copy, reserving power to A. The Court rejected the motion, holding the appointment of "any two of my sons" to be void for uncertainty.—*In the goods of Edward Baylis*, 613.

13.—*Two Testamentary Papers.—Appointment of Executors.—No Revocation.*

In February, 1859, L. duly executed a testamentary paper, whereof he appointed W. Leese, E. Knight, and John Wright, executors. In October, 1860, he made another testamentary paper, disposing in a different manner of his personal property, but not affecting realty, which was dealt with by the first paper; of the second paper he appointed the same W. Leese and Thomas Devall, executors. Held, that the second appointment of executors was no revocation of the first appointment, and that, as the bare nomination of executors entitles a paper to probate, leave should be reserved, on the second set of executors taking probate of the two papers as together containing the last will and testament of the deceased, to the first set of executors to come in and prove.—*In the goods of Matthew Leese* (deceased), 442.

14. *Trustee for Specific Purpose.—Not Executor according to the Tenor.*

Where the whole personal property is left to a trustee on trust for a specific purpose, and no executor is named in the will, such trustee is not entitled to probate as executor according to the tenor. *Semble:* to constitute an executor according to the tenor, there must be words importing a general power to receive and pay what is due to and from the estate.—*In the goods of James Jones* (deceased), 155.

GUARDIAN.

Testamentary Guardian.—Guardian elected by Minors.

A testamentary guardian of minor children is entitled to a grant of administration for their use and benefit, preferably to a guardian elected by the children. Grant made to the latter revoked, and a fresh grant made to the testamentary guardian.—*In the goods of Louisa Morris, Widow*, (deceased), 360.

INCORPORATION.

Will.—Incorporation.—Reference.—Probate.—Real Property.

H. D. made a testamentary disposition on the first page of a sheet of note-paper, which was signed by himself, and attested by one witness only. He shortly afterwards duly executed a testamentary disposition (but which contained no reference to the former disposition) on the third side of the same sheet. At the time of the execution he did not mention to the attesting witnesses the writing on the first page, and one of them believed he asked them to attest his will. Held, that the disposition on

INCORPORATION—*continued.*

the first page was not incorporated in the document executed on the third page, and was therefore inoperative. That, as the disposition on the third page related exclusively to real property, it was not entitled to probate.—*In the goods of Henry Drummond* (deceased), 8.

INTEREST.

1. *Interest to oppose a Will.—Judgment of Foreign Court.—Demurrer.*

The possibility of a party having an interest in the result of setting aside the will is a sufficient interest to enable him to oppose the will. But the possibility of his filling a character which would give him an interest, would not entitle him to oppose a will. C. being ordered by the Court to declare his interest to sustain a testamentary suit in respect of certain moneys in English funds, alleged in his declaration, among other things, that by the law of Portugal the natural child of a man, not noble, dying intestate and a bachelor, is entitled to all the movable and immovable property of his father; and that C., in a suit of filiation and inheritance in the Portuguese Courts, to which the defendant of the present suit and her husband were defendants, obtained a decree declaring C. to be the natural son of H. C., and to be entitled to his property, and ordering the defendants to deliver up to C. all the property of H. C. which they had in their possession. The defendant, by her plea, traversed many of the averments of the declaration; but admitted that the above judgment in the Portuguese Courts was in fact obtained. C. replied and demurred, on the ground that the judgment admitted by the plea established his interest. On argument on the demurrer, the Court held, that the judgment as pleaded was not conclusive of C.'s interest to sustain a suit in this Court, overruled the demurrer without costs, and directed the parties to prove their respective cases.—*Crispin* v. *Doglioni*, 17.

2. *Will.—Queen's Proctor.—Alleged Next of Kin opposing.—Interest.—Practice.—Costs.*

A party propounding a will may put any person opposing it on proof of his interest; but where two parties oppose a will, *e. g.* the Queen's Proctor and an alleged next of kin, neither can put the other on proof of his interest.—*Hingeston* v. *Tucker and Her Majesty's Proctor* (intervening), 596.

LEGATEE.

Will.—Codicil.—Citation of Parties interested to prove Codicil.

A legatee under a codicil, believed by the executors of the will to be invalid, cannot be cited by them. The executors, if they intend effectually to exclude the codicil from probate without propounding it, should proceed to prove the will in solemn form, and cite the legatees to see it proved.—*In the goods of William Benbow* (deceased), 488.

MARRIED WOMAN.

Will of Married Woman.—No Executor.—Husband entitled to Grant.

Where a married woman makes a will and appoints no executor, the per-

MARRIED WOMAN—*continued.*

sons interested under the will are entitled to the grant in priority to the husband, who can only obtain the grant on their renunciation being filed in the Registry.—*In the goods of Maria Bailey, wife of Henry W. Bailey* (deceased), 135.

MODE OF TRIAL.

1. *Issues to Assizes.—Affidavit.*

The Court will not direct an issue to the assizes except upon an application supported by an affidavit.—*Brandreth* v. *Brandreth and Wife*, 446.

2. *Issues of Law and Fact.—Testamentary Suit.—20 & 21 Vict. c. 77, s.* 35.

The Court has the power to direct issues of fact to be tried before itself by a jury, reserving issues of law arising out of the pleadings in the same suit to be tried by itself alone.—*Crispin* v. *Doglioni*, 493.

MUTUAL WILLS.

Mutual Will.—Survivor.—Probate.

B. and C., sisters living together, executed a testamentary paper, to the effect that the survivor should have all that remained of their property at the death of the first deceased, and that at the death of the survivor it should be divided amongst certain relations. C. survived B., and died without having altered or revoked such paper, and the Court granted administration with the will annexed, as the last will and testament of C.—*In the goods of Letitia Lovegrove* (deceased), 453.

PLEADING.

1. *Fraud.—Undue Influence.*

Where it is intended to invalidate a will on the ground of fraud, or of circumstances tantamount to a charge of fraud, there should be a plea on the record alleging that the execution of the will has been obtained by fraud. A plea of undue influence is insufficient to let in a charge of fraud against the party propounding the will.—*White* v. *White and Cato*, 504.

2. *Plea.—Demurrer.—Practice.*

Where a party takes no step on an order to join in demurrer within a given time, the party demurring is at the expiration of the time entitled to judgment on the demurrer.—*Wells* v. *Wells*, 607.

3. *Domicil.—Will.—Declaration.—Demurrer.*

Where a declaration propounding a will depends on due execution according to the law of testator's domicil, it must contain a distinct averment that it was duly executed according to the law of the domicil. An averment that the will was admitted to probate by a competent Court of the alleged domicil is insufficient.—*Isherwood* v. *Cheetham*, 607.

4. *Legitimacy.—Queen's Proctor's Suit.—Pedigree.—Marriage.*

In a plea of legitimacy, in answer to the Queen's Proctor's declaration, the steps of the pedigree must be set out; but it is not necessary to plead that a marriage was solemnized at a particular time and place, and that certain issue was born after the date of the marriage.—*Dyke (Queen's Proctor)* v. *Williams*, 465.

PLEADING—*continued.*

5. *Queen's Proctor's Suit.—Legitimacy.—Practice.*

The pedigree of parties claiming to be related to a deceased intestate, as against the Queen's Proctor's allegation of bastardy, must be set out, but it is sufficient to aver that B. was the legitimate child of A. and his lawful wife, without stating the time or place of the marriage, or the name of the wife, or the date of the birth of B.—*Dyke (Queen's Proctor)* v. *Wallis and Others*, 466.

6. *Suit for Revocation of Probate.—Declaration.—Reference to earlier Will.—Pleading.*

Where the executors of a later will, having called in the probate of a will of prior date, propounded in a declaration the later will, it is not competent to them to allege in their declaration that the probate of the earlier will was surreptitiously obtained, or that the earlier will ought to be pronounced null and invalid.—*Rosbotham and Others* v. *Rosbotham*, 121.

PRACTICE.

1. *Death of Plaintiff after Argument and before Judgment.—Judgment suspended.—Representation.*

The plaintiff dying after the case had been argued before the Court but before judgment, the Court suspended its judgment till a personal representative of the plaintiff made himself a party to the record.—*Staines* v. *Stewart and Jones*, 326.

2. *Administration* de bonis non.—*Doubt as to Correctness of original Grant.—Presumption after lapse of Time.*

In 1807, the Prerogative Court granted letters of administration with the will annexed to B. as substituted legatee, reciting that no executor had been named in the will, and that C., the universal legatee for life, had survived the testator, but died without taking administration. On application for administration *de bonis non*, a doubt arose in the Registry, on looking at the will, whether the property had not been given absolutely to C., and consequently whether the grant in 1807 was not incorrect. But the Court held that, after such a lapse of time, it would presume that the recital in the orignal grant was correct, and (there being no one before it having an interest and calling upon it to do so) would not go into the question of the construction of the will.—*In the goods of George Augustus Frederick Smith* (deceased), 371.

PROBATE.

1. *Addition after Execution.—Will.—Motion to omit Name in Probate.*

B. made her will in the presence of C. and D., who subscribed the same; subsequently E., an executor and legatee in the will, at the request of the testatrix, signed his name, to signify, as suggested, his acceptance of the executorship. The Court rejected a motion praying to omit E.'s name in the probate.—*In the goods of Jane Forest* (deceased), 334.

2. *Will.—Clause introduced* per Incuriam.—*Probate.*

Where a clause is introduced in a testamentary paper *per incuriam*, and the deceased executes the paper, not having given any instructions for, and being ignorant of the existence of such clause, it forms no part of the

PROBATE—*continued.*

will of the deceased, and probate will be granted of the remainder of the paper, omitting such clause.—*In the goods of Thomas Duane* (deceased), 590.

3. *Codicil.—Informal Paper.—Doubt as to Dispositive Effect of.—Title to Probate.*

B. on his death-bed dictated a writing in the form of a letter, but attested by two witnesses, requesting C., the devisee for life of certain estates under B.'s will, to consent to charge them with £10,000, to be raised as soon as possible after B.'s death, adding that he knew the request was not legal. The Court decreed probate of the paper on motion, in order that the question of construction might be brought before a Court of Equity.—*In the goods of Edward Miller Mundy, Esq.* (deceased), 119.

4. *Paper on Face of it not Testamentary.—Burden of Proof.*

Where a person claims probate of a paper signed and attested, but not on the face of it clearly testamentary, the burden of proof is on that person to satisfy the Court that it was executed *animo testandi.—Thorncroft and Clarke* v. *Lashmar*, 479.

PROTECTION ORDER.

1. *Protection Order for Wife's Earnings.—Minor Children.—Guardian.—Administration.*

Where the wife had obtained a magistrate's order protecting her property and earnings since April, 1851, and died intestate, leaving minor children, the Court granted administration to the uncle of the children, elected by them guardian for that purpose, though the husband was alive.—*In the goods of Mary Weir* (wife of Peter Weir, deceased), 451.

2. *Protection Order.—Non-registration.*—20 & 21 *Vict. c.* 85, *s.* 21.

B., a married woman, obtained a protection order for her property on the 12th of April, 1861; she made a will on the 19th, and died on the 24th of the same month. The order was not entered with the Registrar of the County Court till the 24th, being more than ten days after it was obtained. Held, that the requirement of the statute as to the entry of the order with the Registrar is directory and not imperative, and, on affidavits from the executors that they were ignorant of the husband's place of abode, probate was granted, limited to the property acquired since the date of desertion.—*In the goods of Betty Faraday* (wife of Martin Faraday, deceased), 369.

RENUNCIATION.

Administration.—Intermeddling with Estate through Mistake.—Renunciation of Widow.—Form.

When the widow of a deceased had intermeddled with his estate on the erroneous supposition that she was appointed his executrix by his will, the Court allowed her to renounce her right to administration, omitting the declaration usually inserted in the Form of Renunciation, "that she "had not intermeddled with his estate."—*In the goods of William Fell* (deceased), 126.

REVIVAL.

1. *Revival of Revoked Will by Codicil.—Mistaken Reference in Codicil.—Alterations.—Probate.*

A. executed a draft will in April, 1847. In May, 1847, he executed an engrossed will. In September, 1854, he executed a codicil purporting to be a codicil to his last will of April, 1847: it was supposed that he really intended it to be a codicil to the will of May, 1847. The draft will contained interlineations in the testator's handwriting in ink and pencil, and cancellations. Both wills were in the handwriting of the same person, who deposed that he copied the engrossed from the draft will. The engrossed will agreed with the draft will as altered in ink, but not as altered in pencil. Probate decreed of the draft will of April, 1847, including the alteration in ink, but not those in pencil, in so far as they agreed with the will of May, 1847, together with the codicil of 1854.—*In the goods of Matthew Cotes Wyatt* (deceased), 494.

2. *Wills and Codicils.—Destruction of later Will.—Revival of Reference to and Confirmation of Testamentary Papers by duly-executed Letter.*

C. made a will on the 30th of April, 1857, in which he devised to H. a freehold house for life, and the residue of his real and personal estate to B. C., making H. and B. C. executors. In September, 1857, he made a codicil "to my last will of the 30th of April, 1857," by which he left H. £200 in addition to the devise in the will, and left other specific money legacies. On the 13th of February, 1858, he made another codicil referring to his will of 1857, and bequeathed a leasehold house and the furniture therein to H., and otherwise confirmed his will. On the 3rd of June, 1858, he made a will identical with that of 1857, except the substitution of F. C. for B. C.; at the same time he re-executed the codicil of September, 1857, which then purported to be a codicil "to my last will, dated the "3rd of June, 1858." On C.'s death in March, 1862, the will of April, 1857, and the two codicils were found in an envelope sealed and indorsed by C., "sealed the 13th of June, 1860, P. F. M. M'C." The will of 1858 was not forthcoming, though it had been in testator's possession. There was evidence tending to show that before the beginning of 1860 deceased intended to exclude F. C. and reinstate B. C., and that he had destroyed the will of 1858. In June, 1860, deceased wrote a letter to H. confirming what he had already done by will for her, which letter was signed by him and attested. The Court granted probate of the last will of C., as contained in the letter and the papers found in the sealed envelope.—*In the goods of Peter Francis M'Cabe* (deceased), 474.

See CODICIL, 2. COSTS, 3.

3. *Two Wills.—Destruction of prior Will.—Effect of Reference to prior Will by Codicil.—Sect. 9 of Wills Act.*

Where a testator made a will in 1858, and another in 1859, and the will of 1858 was burnt by his direction, and in a codicil made in 1860 he said, "It is my wish that this should be added as a codicil to my last will, "made 1858." Held, that the will of 1858 not being in existence as a

REVIVAL—*continued.*

paper writing at the date of the codicil, could not be revived by it under sect. 9 of 1 Vict. c. 26.—*Rogers and Another* v. *Goodenough and Others*, 350.

REVOCATION.

1. *Revocation of Grant of Administration.—Grant Properly Made.—Practice.*

Semble: where a general grant of administration is properly made, the practice is against revoking it, even with consent of the grantee, unless the grantee has become incapable by the act of God. Grants to creditors, however, are an exception to this rule.—*In the goods of Louisa Morris, widow* (deceased), 360.

2. *Revocation of Will.—Cutting Will.—Dependent Relative Revocation.—Probate.*

Where a testator cut a piece out of his will which had been duly executed, containing the word "witnesses," and the names of the attesting witnesses, giving his reason at the time, for having so cut the same, that he had some idea of altering it, and having a new will made; and subsequently, on the same day, refastened the piece he had so cut out, saying "that his will would do for the present, and that if he wanted another will made he could do it afterwards," and died without making another will: The Court, on motion, but with the consent of the parties interested in case of an intestacy, granted probate of the will to the executors named therein.—*In the goods of Thomas Eeles* (deceased), 600.

3. *Dependent Relative Revocation.—Execution of New Will.—Subsequent Destruction of Old Will by Testator.—New Will pronounced against.*

Where a testator was said to have executed a will in 1859 (which was pronounced against), and thereupon was said to have destroyed a will made in 1857, saying at the time, "that it is no use his keeping it now, as he had another," and there was no evidence before the Court of the ground on which the second will had been pronounced against, the Court held the destruction of the first will to have been a dependent relative revocation, and decreed probate to the draft thereof.—*Clarkson* v. *Clarkson and Others*, 497.

4. *Wills.—Revocation and Destruction of Earlier One.—Reference to by subsequent Codicil.*

Where there is a distinct reference in a subsequent codicil to a revoked and destroyed will of an earlier date, as "my last will of such a date," parol evidence cannot be admitted to show that the reference was by mistake, and that the testator intended a will of a later date to operate: Probate of such later will refused.—*In the goods of Joseph Goodenough* (deceased), 141.

5. *Two Wills.—Destruction of prior Will.—Reference to prior Will by Codicil.—Later Will not revoked.—Sect. 20 of Wills Act.*

Where a testator made a will in 1858, and another in 1859, and the will of 1858 was destroyed by his directions, and afterwards, in 1860, he made

REVOCATION—*continued.*

a codicil "to his last will made 1858:" Held, that the codicil, as it contained no express intention to revoke the will of 1859, and did not avail to set up an inconsistent will, did not in law, under the 20th section of the Wills Act, revoke the will of 1859.—*Rogers and Another* v. *Goodenough and Others*, 342.

SEAMAN'S WILL.

Seaman's Will.—Informal Testamentary Paper.—1 *Vict. c* 26, *s.* 11.

The deceased, who was master of a trading vessel, in the course of a voyage arrived at Port Adelaide, from whence he wrote, and forwarded by post a letter, some sentences of which were testamentary. The vessel was subsequently lost at sea. Held, that the deceased was a mariner at sea, and consequently that such a letter, being in the handwriting of the deceased, and testamentary, was entitled to probate.—*In the goods of John Parker* (deceased), 375.

WILL.

Scotch Marriage Contract or Settlement.—Quasi *Testamentary Indorsement.*

B. and C., domiciled Scotch people, in contemplation of their marriage, entered into a contract or settlement in December, 1823, under which they had certain powers of appointment. On the fly-sheet of the settlement appeared what described itself as a codicil, dated September, 1832, signed by B. and C., and attested by two witnesses. Below this, under date of 1st January, 1837, was a holograph of Alexander Stoddart, and signed by him, which purported to be testamentary. In 1855, the deceased acquired an English domicil, which he retained till death. On motion, the Court refused to grant letters of administration with the settlement and two writings annexed, as together containing the last will and codicil thereto of deceased.—*In the goods of Alexander Stoddart* (deceased), 356.

See ATTESTATION. CODICIL. CONDITION. EXECUTION. EXECUTOR. INCORPORATION. LEGATEE. MUTUAL WILLS. SEAMAN'S WILL.

INDEX TO DIVORCE CASES.

ABATEMENT.

1. A suit for declaration of nullity brought by the father in respect of his daughter's alleged marriage. Held, to have abated by the father's death, and that the mother, the executrix of the father, had no interest to entitle her to carry on the suit.—*Bevan* v. *M'Mahon and Bevan*, 58.
2. A petition for dissolution of marriage abates on the death of the respondent. The Court refused, on application of the petitioner, to order the petition to be removed from the file. *Semble*, on affidavit of respondent's death, the cause will be struck out of the cause list.—*Brocas* v. *Brocas*, 383.
3. The husband obtained a decree *nisi* for dissolution against his wife, and died before it could be made absolute. The petition prayed the Court to deal with a post-nuptial settlement, and the guardian of the minor children of the petitioner moved to be allowed to intervene for the purpose of making the decree *nisi* absolute, and of obtaining an order of the Court in respect of the settlement. The Court held, that the suit had abated by the death of the petitioner, and that no other party had any right to move in the matter.—*Grant* v. *Grant and Bowles and Pattison*, 522.

ADJOURNMENT. *See* PRACTICE, 8.

1. *Quære*, whether, where a case which has been adjourned comes on for further hearing, the petitioner is entitled to examine any of the witnesses whom he examined at the first hearing.—*Alexander* v. *Alexander and Amos*, 95.
2. Where a case has been in part heard before the Judge Ordinary, and is adjourned for further proof and argument before the full Court, the facts proved before the Judge Ordinary must be proved again before the full Court.—*Brodie* v. *Brodie*, 259.

ADULTERY.

1. Subsequent adultery revives cruelty once condoned, so that the adultery and cruelty form a ground for a sentence of dissolution of marriage.—*Palmer* v. *Palmer*, 61.
2. But *quære*, whether subsequent adultery could revive bigamy condoned.—*Furness* v. *Furness*, 63.
3. Adultery of the petitioner, though condoned, enables the Court to exercise its discretionary power under the 31st section of the Divorce Act.—*Goode* v. *Goode and Hamson*, 253.

ADULTERY—*continued.*

4. Adultery proved against the petitioner on the intervention of the Queen's Proctor, a wife guilty of adultery cannot sustain a petition on the ground of any matrimonial offence of the husband.—*Drummond* v. *Drummond*, and the Queen's Proctor intervening, 269; *Latour* v. *Latour and Weston*, and the Queen's Proctor intervening, 524.

   Adultery admitted by petitioner on the Queen's Proctor's intervention; the Court rejected petitioner's application to take the petition off the file.—*Gray* v. *Gray*, and Queen's Proctor intervening (before the Judge Ordinary), 263; same case on appeal before full Court, 266; *Boulton* v. *Boulton and Page*, and the Queen's Proctor intervening, 638.

5. Reasonable suspicion of adultery is a bad plea to a suit for restitution of conjugal rights.—*Burroughs* v. *Burroughs*, 303.

6. Adultery proved against Petitioner on co-respondent's plea.—*Seddon* v. *Seddon and Doyle*, 640.

7. The petitioner must establish the adultery of the respondent by satisfactory affirmative evidence.—*Alexander* v. *Alexander and Amos*, 101.

   And where the wife had not answered the petition, and the Jury had found the issue of adultery as between the petitioner and the corespondent in favour of the former, the Court, not being satisfied that the evidence established adultery against the wife, refused to make a decree, but gave leave to the petitioner to produce further evidence.—*Dolby* v. *Dolby and Hewitt*, 228.

AFFIDAVIT.

1. Petition allowed to be proved by affidavit where there had been a previous conviction of bigamy.—*March* v. *March*, 49.

2. False statements in affidavit to lead marriage licence, do not make the marriage void.—*Bevan* v. *M'Mahon*, 230.

3. Affidavit of service of order to pay costs should have a copy of the order annexed.—*Busby* v. *Busby and Vine*, 383.

4. Where issue is joined on the record on pleas pleaded by the Queen's Proctor as an intervener, the Court cannot direct such issue to be tried by affidavits.—*Boulton* v. *Boulton and Page*, and the Queen's Proctor intervening, 551.

5. On motion for new trial the Court will read affidavits of witnesses examined at the trial.—*Gethin* v. *Gethin*, and the Queen's Proctor intervening, 560.

AFFINITY. *See* NULLITY OF MARRIAGE, 2.

ALIMONY. *See* COSTS, 15. PRACTICE, 15.

1. Not only the wife's income derived from separate property will be taken into account in allotting alimony, but income of which she is in the actual enjoyment, though earned by herself.—*Goodheim* v. *Goodheim and Frankinson*, 250.

2. Alimony *pendente lite* ceases when the decree *nisi* for dissolution is made, for as between the petitioner and respondent, that decree, if not appealed from, puts an end to the litigation.—*Latham* v. *Latham and Gethin*, 299.

ALIMONY—*continued.*

3. After a decree *nisi* for dissolution, by reason of the wife's adultery, she is not at liberty to file a petition stating the amount and sources of the husband's income, and praying that a gross sum of money or yearly sum for her life should be decreed to her.—*Winstone* v. *Winstone and Dyne*, 246.
4. Where a wife had obtained a decree of judicial separation, and the Court had ordered that she should have the custody of three children, all under the age of seven years, the husband's income being taken at £400 per annum, the Court allotted £160 as permanent alimony.—*Whieldon* v. *Whieldon*, 388.
5. The legislature did not intend that a wife entitled to a decree of dissolution, should purchase it at the price of being left destitute; and where the circumstances of the husband allow of it, the Court will direct a maintenance to be secured to the woman so long as she remains chaste and unmarried.—*Fisher* v. *Fisher*, 410.
6. The Court will refuse to allot alimony *pendente lite* where the husband has no income or fund out of which he could pay it.—*Fletcher* v. *Fletcher*, 434; *Beavan* (an infant, by his guardian) v. *Beavan*, 652.
7. Where the husband pays the premium on a policy of insurance on his life, which policy is in settlement for the benefit of his wife and children after his death, the amount of premium paid is a proper deduction from his income on a question of alimony.—*Forster* v. *Forster and Thomas*, 553.
8. Under 24 & 25 Vict. c. 134, the wife may prove as a creditor under the bankruptcy, for any sum due by way of alimony; and the order of discharge, under the Act, will discharge the husband from liability in respect of alimony which might have been so proved.—*Dickens* v. *Dickens*, 645.
9. Under certain circumstances, the Court will, under the 32nd section of the Divorce Act, make provision for the maintenance of the woman whose marriage is dissolved by reason of her adultery.—*Bent* v. *Bent and Footman*, 392.

APPEAL. *See* COSTS, 14. COURT, 2, 4, 5.

ATTACHMENT. *See* ALIMONY, 8.

1. Where an order for payment of a sum of money within a specified time is made and personally served, a personal demand for payment is unnecessary to found a motion for attachment for disobedience to the order.—Compare *Thomas* v. *Thomas*, 64; with *Nicholls* v. *Nicholls*, 637.
2. Attachment will not be granted for non-payment of costs pursuant to an order, unless a copy of the order be annexed to the affidavit of service.—*Busby* v. *Busby and Vine*, 383.
3. Attachment for non-payment of costs will not be granted, unless the original order for payment has been served upon the party liable by showing it to him.—*Davies* v. *Davies and Dalby*, 437.
4. Where an office copy of a decree to take the petitioner home, etc., has been personally served upon the husband, an attachment will be granted

ATTACHMENT—*continued.*

against him on affidavit of the service of the decree, of no step having been taken by the husband to obey it, and that no certificate of compliance with the order has been filed by him in the registry. If the husband has not appeared in the suit, no notice of the motion for attachment need be given.—*Alexander* v. *Alexander*, 385.

5. Attachment will be granted against a husband for disobedience to an order to pay a sum of money into Court to meet the wife's costs of trial, though he states on affidavit his inability to comply with the order.—*Hepworth* v. *Hepworth*, 415.
6. Where a party is in custody under an attachment for non-payment of costs, etc., and it is desired to charge a second attachment upon him, the Court will, upon motion, direct a writ of *habeas corpus* to issue to the person having custody of the party; and on the appearance of such party, he will be charged on the second attachment.—*Dickens* v. *Dickens*, 521.
7. An attachment is good, though not indorsed with the amount of costs for non-payment of which it was issued.—*Pearson* v. *Pearson*, 546.

BANKRUPTCY. *See* ALIMONY, 8.

BIGAMY. *See* AFFIDAVIT, 1.

1. *Quære*, whether, in a suit for dissolution by reason of adultery and bigamy, adultery must be proved to have taken place with the same person with whom the bigamous marriage was contracted.—*Horne* v. *Horne*, 48.
2. To establish bigamy as a ground for the sentence of the Court, there must be proof of such a ceremony as, but for the former marriage, would constitute a legal marriage. Thus, if the bigamy relied upon took place abroad, it will be necessary to give formal proof of the marriage law of that country.—*Burt* v. *Burt*, 88.
3. *Quære*, whether bigamy condoned would be revived by subsequent marital misconduct, so as to found a sentence of dissolution of marriage.—*Furness* v. *Furness*, 63.

CHILD. *See* ABATEMENT, 3. ALIMONY, 4. DAMAGES, 3.

1. On decree of dissolution by reason of the wife's adultery, the Court directed two-thirds of the bulk of certain property to which she was entitled under certain trusts to be settled on the children immediately, and the remaining third after her death.—*Bacon* v. *Bacon and Bacon*, 86.
2. Where there is no issue of the marriage, the Court has no power to deal with marriage settlements under 22 & 23 Vict. c. 61, s. 5.—*Thomas* v. *Thomas*, 89.
3. On motion for an interim order for the custody of children, the Court will consider all the existing circumstances at the time of the application, but will not allow affidavits to be read as to the truth or falsehood of the charges brought by the parties to the petition against each other. The Court has no jurisdiction to make any order as to the custody of chil-

CHILD—*continued.*

dren upwards of sixteen years of age, but, if necessary, might make an order for their maintenance.—*Ryder* v. *Ryder*, 225.

4. The Court has power to make an order for access merely of one of the parties to a suit to the children *pendente lite.*—*Thompson* v. *Thompson and Sturmfells*, 402.
5. Where the wife succeeds in her suit for dissolution against the husband, she will generally be entitled to the custody of the children; and where the husband takes an interest in the income of the wife's money under settlement, the Court may direct the application of such interest in favour of the mother or the child.—*Boynton* v. *Boynton*, 275.
6. Where a marriage is dissolved on the ground of the wife's adultery, the Court will not order that she should have access to, or the custody of, the children.—*Clout* v. *Clout and Hollebone*, 391; *Bent* v. *Bent and Footman*, 392.
7. If children remain in the custody of the mother who has obtained a decree of dissolution or of judicial separation, the Court will consider that circumstance in allotting permanent alimony, or in making provision for the maintenance of the woman whose marriage is dissolved.—*Whieldon* v. *Whieldon*, 388; *Fisher* v. *Fisher*, 410.
8. Children, apart from their parent the petitioner, can make no claim for an order to vary the application of settled property.—*Grant* v. *Grant and Bowles and Pattison*, 522.
9. The Court will make no order to vary the application of settled property in favour of a child at the prayer of the wife whose marriage has been dissolved by reason of her adultery.—*Thompson* v. *Thompson and Barras*, 649.
10. The father has the common law right to the custody of the infant, however young; and, in the case of an infant of seven months, the Court held that the mother must show more than the natural desire of a mother to induce the Court to exercise its discretion under the Divorce Act in her favour; and as it did not appear that either mother or child were suffering by the separation, the Court refused to make any order pending suit.—*Cartlidge* v. *Cartlidge*, 567.

CITATION.

1. The citation must be returned into and filed in the registry, even where personal service has been dispensed with, before the Court will give directions as to the mode of trial.—*Cooke* v. *Cooke and Quaile*, 50.
2. Service of citation made out of this country on a foreigner is good service, but does not of itself found the jurisdiction of the Court.—*Simonin* v. *Mallac*, 75.
3. If a foreigner appears to a citation otherwise than under protest, he submits himself to the jurisdiction of the Court.—*Bond* v. *Bond*, 93; *Zycklinski* v. *Zycklinski*, 420.

COLLUSION.

1. That petitioner and respondent are acting in collusion to obtain a decree, is a good plea on the part of the Queen's Proctor; but the party is

COLLUSION—*continued.*

entitled to be acquainted with the character of the collusion intended to be charged, by way of specification or particulars.—*Jessop* v. *Jessop*, 301.

2. To prove collusion, it must be shown that the parties to the record are acting in concert in respect of the petition before the Court. On the trial of an issue of collusion arising on the Queen's Proctor's intervention in the wife's petition, to which the husband had not appeared, statements made by the husband, not in the presence of the wife, were held to be inadmissible as evidence on the issue before the jury. Held also, that the petitioner could not be called as a witness.—*Gray* v. *Gray*, and the Queen's Proctor intervening, 554.
3. As to collusion pleaded by the Queen's Proctor, see also *Drummond* v. *Drummond*, 269; *Gray* v. *Gray*, 263, 266; *Cox* v. *Cox*, 307; *Latour* v. *Latour and Weston*, 524; *Gethin* v. *Gethin*, 560; *Marris* v. *Marris and Burke*, 530; *Boulton* v. *Boulton and Page*, 639; *Pollack* v. *Pollack*, 648.

CONDONATION.

1. All condonation is conditional on no offence of which the Matrimonial Court can take cognizance being in future committed.—*Palmer* v. *Palmer*, 61; but see *Furness* v. *Furness*, 63.
2. Condonation of the petitioner's adultery or cruelty does not hinder the Court from exercising its discretionary power under the 31st section of the Divorce Act, in respect of such adultery or cruelty.—*Goode* v. *Goode and Hamson*, 253.
3. Condonation by a respondent who has obtained a decree *nisi* for dissolution does not enable the Court to dismiss the petition; but the Court will, at the instance of both parties, order all further proceedings to be stayed.—*Lewis* v. *Lewis*, 394.
4. Where the wife, after acts of cruelty committed by the husband, continued to live with him, in ignorance, however, of his adultery, which had then in fact taken place, though it did not come to her knowledge till afterwards, the Court was inclined to hold that cruelty condoned under such circumstances would in effect revive upon the subsequent knowledge of the adultery and action taken thereupon; and that the wife's acquaintance with the husband's delinquencies of all sorts may be a branch of the condition on which all condonation depends.—*Dempster* v. *Dempster*, 438.

CONDUCT OF SUIT.

On motion to make decree *nisi* absolute, the Attorney-General obtained leave to show cause, on the ground that it had just came to the Queen's Proctor's knowledge that the business of the petitioner's suit had been chiefly conducted by the managing clerk of the attorney who had entered an appearance on behalf of the respondent. Subsequently, on affidavits filed in explanation of the circumstance, the Court made the decree absolute, and made no order as to the Queen's Proctor's costs.—*Cox* v. *Cox*, 306.

CONJUGAL RIGHTS. *See* ATTACHMENT, 4.

1. To a petition for restitution of conjugal rights, the respondent is estopped from pleading the identical charges which had previously been in issue between the same parties in another suit, and which the respondent had then failed to prove; provided that in both suits the same evidence only would be admissible in respect of such charges.—*Sopwith* v. *Sopwith*, 160.
2. Nothing can be pleaded in bar to a petition for restitution of conjugal rights but what would entitle the respondent to a sentence of judicial separation.—*Burroughs* v. *Burroughs*, 303.
3. Where the wife's petition for restitution of conjugal rights, met by the husband's answer charging adultery, is heard before the Court without a jury, her counsel have a right to begin, though the substantive issue may be raised on the husband's answer. In such a suit the husband is a competent witness in support of his answer alleging the wife's adultery, for the Court, on his evidence, might refuse the decree of restitution, though it would not make a decree for judicial separation.—*Burroughs* v. *Burroughs*, 544.

CONNIVANCE.

1. No blindness or weakness on the part of the husband, short of an actual willing consent beforehand to the wife's adultery, will constitute connivance, so as to bar his title to a dissolution of marriage by reason of the wife's adultery.—*Marris* v. *Marris and Burke*, and the Queen's Proctor intervening, 530; *Allen* v. *Allen and D'Arcy*, 108 *n*.
2. Husband and wife executed a deed of separation in 1854, which recited, amongst other things, that the husband had for some months been living with a Miss H., and referred to certain articles of agreement concerning certain trust moneys and other property, to which Miss H. as well as the husband and wife, had been party. In 1860 the wife petitioned for judicial separation, on the ground of the husband's adultery with Miss H., in 1858–9. The Court held that the execution of the deed of separation by the wife, knowing at the time that the husband was cohabiting with H., was virtually a consent to the continuance of such cohabitation, and dismissed the petition.—*Thomas* v. *Thomas*, 113.

CONTEMPT OF COURT. *See* COURT, 6.

CO-RESPONDENT.

1. The Court has no power to order immediate execution for the recovery of damages awarded against a co-respondent and ordered to be paid to the petitioner, nor to order that such damages be paid into Court.—*Pounsford* v. *Pounsford and Bulpin*, 389.
2. On notice of abandonment of petition by petitioner, the Court dismissed the petition, and condemned the petitioner in co-respondent's costs.—*Symons* v. *Symons and Pike*, 435.
3. Unless the petitioner can satisfy the Court on affidavit that he cannot or ought not to make a co-respondent, the 28th section of the Divorce Act is imperative that he should do so.—*Quicke* v. *Quicke*, 419.
4. If the petition is dismissed the petitioner will not be entitled to costs from the co-respondent, though he may have proved his adultery with petitioner's wife.—*Seddon* v. *Seddon and Doyle*, 640.

COSTS. *See* AFFIDAVIT, 3. ATTACHMENT, 1, 2, 3, 5, 6, 7. ALIMONY, 8. CO-RESPONDENT, 2, 4. PRACTICE, 5, 13, 21, 22.

1. On taxation of wife's costs in a petition for judicial separation pending suit, the Court affirmed the Registrar's taxation, disallowing all costs incurred before actual proceedings taken against the husband, and various items charged for attendance on the wife's father in connection with her case.—*Dickens* v. *Dickens*, 103.
2. Where the Registrar has directed a sum of money to be paid into Court to meet the expenses of the wife's petition at the hearing, and her suit fails, the husband will not be liable to a greater amount than the sum so paid in, though the wife's costs, as ascertained on taxation, exceed that sum.—*Sopwith* v. *Sopwith*, 105.
3. The wife's costs in a matrimonial suit are taxed against the husband, as between party and party, but not in all respects on the same principles as a taxation at common law between party and party. Thus, though certain issues may have been found against the wife, whose costs are being taxed, the expenses incurred by them may be allowed, unless the Registrar should think that they were wantonly and vexatiously raised. Expense of witnesses to prove the circumstances of a plea not in issue, if such circumstances have a bearing on other parts of the case in issue, may be allowed; and a reasonable amount of expense incurred in investigating and acquiring information as to the circumstances of the case should be allowed.—*Allen* v. *Allen and D'Arcy*, 107.
4. Where the wife, respondent, joins in a commission to examine witnesses abroad, the Court will order the husband to advance a sum of money to defray her expenses in that respect.—*Baily* v. *Baily and Della Rocca*, 112.
5. Where the Court, on a decree of dissolution at petition of the wife, ordered the husband's interest under a settlement to be diverted in favour of the wife and child, it made no order as to the costs of the application for that purpose.—*Boynton* v. *Boynton*, 277.
6. A wife suing *in formâ pauperis* for a dissolution of marriage, if she obtains a decree, is entitled to costs.—*Afford* v. *Afford*, 387.
7. On application on behalf of the wife to withdraw the petition for judicial separation and file one for dissolution of marriage, the Court asked whether the wife's Proctor had received his costs in the first suit.—*Ashley* v. *Ashley*, 388.
8. Where an order had been made on the husband, respondent, to pay into Court or give security for a sum of money to meet the wife's costs of the hearing to be subsequently taxed, and such order was not obeyed, and the respondent alleged on affidavit his inability to raise the money or give security, the Court ordered an attachment to issue against him, but to lie in the registry for one week from the date of such order.—*Hepworth* v. *Hepworth*, 415.
9. Costs of application for further time to answer, etc., on behalf of the wife, will not, as a general rule, be taxed against the husband, nor costs of a motion for the husband to attend and be examined on the wife's petition

COSTS—*continued.*

for alimony and his answer on oath thereto, when the result of his examination is to establish the truth of his answer on oath.—*Harding* v. *Harding and Lance*, 549.

10. Generally, where a decree *nisi* is reversed on the intervention of the Queen's Proctor, the petitioner will be condemned in the costs of such intervention.—*Latour* v. *Latour and Weston*, 524; *Boulton* v. *Boulton and Page*, 638.

11. But where the petitioner, in reply to the Queen's Proctor's plea, admitted her own adultery, but denied collusion, and the Queen's Proctor went to a jury on that issue and failed, the Court made no order as to costs; *Quære*, whether the Court has power to give costs against the Crown.—*Gray* v. *Gray*, 559.

12. Where the Queen's Proctor fails in showing cause against a decree *nisi* being made absolute, his costs will be costs of his office.—*Cox* v. *Cox*, 306.

13. After a decree *nisi* at petition of husband, the wife filed a petition for permanent alimony, or for some payment in lieu thereof. The Court refused to entertain the application, or to allow the wife's costs to be taxed against the husband.—*Winstone* v. *Winstone and Dyne*, 246.

14. The wife's costs of an appeal will not, as a matter of course, be taxed against the husband.—*Thompson* v. *Thompson and Sturmfells*, 404.

15. The wife, respondent, is entitled to have her costs taxed as usual against the guardian of an infant husband petitioner; and though the Court rejected her application for alimony *pendente lite*, as she failed to show that the husband had any income, it directed the costs of the motion to be taxed on behalf of the wife, as a new point of law was raised.—*Beavan* (by his Guardian) v. *Beavan*, 652.

16. The Court rejected a motion that the wife, respondent, might be allowed to show cause against a decree *nisi* being made absolute, and directed the costs not to be taxed against the husband.—*Stoate* v. *Stoate*, 384.

COURT. *See* CHILD, 2, 3, 4. CITATION, 2, 3.

1. The Judge Ordinary, under 23 & 24 Vict. c. 144 (made perpetual by 25 & 26 Vict. c. 81), may exercise the powers theretofore vested in the full Court, either alone or with the assistance of another Judge.

2. Section 3 gives the like right of appeal to the House of Lords from the Judge Ordinary so acting as theretofore existed from the full Court.

3. Section 5 enables the Court, in certain cases, where one party only appears, to direct counsel to be appointed to argue on the other side.—*Bevan* v. *M'Mahon*, 234.

4. On interlocutory matters not touching the main issue the Court of Appeal will not interfere, unless it is satisfied that the Court below, on the material then before it, was entirely wrong.—*Thompson* v. *Thompson and Sturmfells*, 402.

5. The Court of Appeal will not look at affidavits or any fresh material other than that which was before the Court below when it made the decree or order appealed from.—*Hill* v. *Hill*, 409.

COURT—*continued.*

6. The use of threatening language to a person who is likely to be a witness in a suit, with intention of preventing that person from coming forward to give evidence, is a contempt of Court.—*Shaw* v. *Shaw*, 517.

CRUELTY. *See* EVIDENCE, 4.

1. Condoned, is revived by subsequent adultery, so as together to found a sentence for dissolution.—*Palmer* v. *Palmer*, 61.
2. The cruelty of the petitioner, though condoned, is a ground for the exercise of the discretionary power of the Court under the 31st section of the Divorce Act.—*Goode* v. *Goode and Hamson*, 253.
3. Where the wife had continued to live with the husband after cruelty inflicted by him, she being ignorant of facts of adultery of which she subsequently became aware, and then petitioned for dissolution, the Court held that the cruelty, if in fact condoned, was revived upon her subsequent knowledge of the adultery and action taken thereon.—*Dempster* v. *Dempster*, 438.
4. The wife has no remedy by reason of the husband's cruelty where she has been guilty of adultery herself.—*Drummond* v. *Drummond*, 269.
5. A single act of personal violence by the husband towards the wife, not producing any considerable injury to the person, and not repeated, held not sufficient to found a decree for judicial separation by reason of cruelty. Lapse of time between the act complained and the commencemencement of the suit is not a bar to such a suit, but will weigh with the Court in determining the character of the violence proved.—*Smallwood* v. *Smallwood*, 397.
6. Where, in answer to the wife's petition on the ground of cruelty, the husband alleges such conduct on the part of the wife as justified him in the use of force, the general nature of the conduct should be stated.—*Shaw* v. *Shaw*, 515.
7. It is not necessary that every paragraph in a petition by reason of cruelty should allege a fact or facts on which, if proved, the Court could found a sentence. Some allegations short of this are admissible, as showing the habits and *animus* of the party charged.—*Leete* v. *Leete*, 568.

   Quære, whether conduct and language without violence might entitle a wife to judicial separation.—*Leete* v. *Leete*, 571.
8. Evidence to prove a species of cruelty not pleaded in the petition is not admissible; though evidence of violent demeanour and language, not pleaded but leading up to and making probable acts of violence pleaded, may be admissible.—*Jewell* v. *Jewell*, 573.
9. A wife, married in 1842, discovered in May, 1861, that the husband was carrying on an adulterous intercourse, left his house, and petitioned for reason of adultery and cruelty. It was proved that her husband struck her in the face in 1852; it did not appear that since that he had intentionally struck her, but he had while drunk cut her hand, and in 1858 had cut her finger by throwing a jug of water at her. There was also evidence of his having frequently thrown cold water over her, and of having several times spat in her face. The Court held cruelty to be proved.—*Waddell* v. *Waddell*, 584.

DAMAGES.

1. The Court has no power to order immediate execution for the recovery of damages awarded against the co-respondent and ordered to be paid to the petitioner, nor to order that such damages be paid into Court.—*Pounsford* v. *Pounsford and Bulpin*, 389.
2. Where the husband settled £1000 on trust for the benefit of the wife, against whom he had obtained a decree *nisi* for dissolution, the Court directed £1000 awarded as damages to be paid to the husband.—*Bent* v. *Bent and Footman*, 392.
3. C. obtained a decree *nisi* for dissolution of marriage, and a jury awarded £250 damages. The Court directed C. to assign all his interest in the £250 to a trustee for the use of the only child of the marriage, and in case of the child's death under 21, and unmarried, for the use of C., and suspended the decree till such assignment should be made.—*Clark* v. *Clark and Bouck*, 520.

DECREE *NISI*. *See* PRACTICE, 5, 7, 14, 15.

Where, after decree *nisi* at suit of wife, the respondent condoned the husband's misconduct, the Court held that it was not at liberty to dismiss the petition, but offered, at the prayer of both parties, to stay all proceedings.—*Lewis* v. *Lewis*, 394.

DEMURRER. *See* PRACTICE, 23, 24.

DESERTION. *See* EVIDENCE, 2.

B. and C. married in 1851, and cohabited in England till 1856, when—but under what circumstances did not fully appear—B., the husband, went to China, holding an office in the commissariat. C. and the only child of the marriage, remained in England. By letters written from B. to C. between February and December, 1859, it appeared that B. had led a most extravagant life in China, and had been found guilty by a court-martial of embezzling moneys; that C. and her family had treated B. liberally in respect of money, and in the course of 1859 had provided him with considerable sums on his representations of amendment and intention of going to Australia. These letters expressed affection for his wife and child, but no desire to join them or be joined by them. B. came through Paris to London instead of going to Australia, and on the 10th of December, 1859, wrote to his wife, saying that he had spent all his money, and incurred divers liabilities by borrowing and otherwise. On the 13th of December he addressed a few lines to her, which were the last he wrote, but made no attempt to see her. In November, 1859, he made acquaintance with the woman with whom adultery was proved, and in a letter to her, dated 10th of August, 1860, wrote, "I was forced into a marriage "some years ago with one who is very rich and for whom I had no love. "... I was miserable in my home, and took a Staff appointment abroad "about three years ago. I have not seen my wife for more than three "years." By her petition, dated 7th November, 1861, C. prayed for a dissolution of her marriage by reason of B.'s adultery and desertion; and the Court held that, construing B.'s letters by his acts rather than by their words, his conduct amounted to desertion.—*Lawrence* v. *Lawrence*, 575.

DEED OF SEPARATION.

May under circumstances amount to connivance at consent to respondent's adultery.—*Thomas* v. *Thomas*, 113.

DISCRETION OF THE COURT GENERALLY. *See* EVIDENCE, 1.

DISCRETION OF THE COURT UNDER 31ST SECTION OF DIVORCE ACT. *See* ADULTERY, 3, 4, 6. CONDONATION, 2.

B., an infant, married on the 20th November, 1860, C., a prostitute, several years older than himself; they lived together till the 22nd December following, when, B. being a ward in Chancery, the parties were summoned before the Master of the Rolls, by whose order B. was delivered to his guardians and sent abroad. C. was interdicted from all intercourse or communication with B. C. remained till July, 1861, in the same lodgings in which she had cohabited with B., and no misconduct on her part while there was proved. She applied to B.'s family for money, but received none. Adultery was charged and proved against her in October and November, 1861, and the Court held B. entitled to a decree for dissolution.—*Beavan* (by his guardian) v. *Beavan*, 652.

DOMICIL.

1. C. and D. being native subjects of France, and then domiciled in that country, came over to London in June, 1854, and were married by licence according to the law of England, but without the observance of certain formalities and consents required by the law of France in respect of the marriage of its own subjects in foreign countries. C. and D. returned to France, when D., the man, refused to celebrate the marriage according to the French law, and C. instituted a suit for nullity in the French Courts, which D. did not defend, and in December, 1854, C. obtained a decree of nullity. C. subsequently came to reside in England, and petitioned for a decree of nullity in this Court; personal service of the citation was effected on D. at Naples, who did not appear. Held—1st, that D., having entered into a contract in this country, was subject to the jurisdiction of the Courts of this country in respect of the personal *status* resulting from such contract; 2ndly, that the personal *status* resulting from such contract is to be ascertained by the laws of the country in which the contract was made, and not by any special law of the country of the domicil of the parties to the contract.—*Simonin* v. *Mallac*, 67.

2. D., a native English subject, married C., an Englishwoman, in England; he afterwards left her, acquired a domicil in the the United States of North America, and intermarried there with E. C. petitioned for dissolution; the Court took time to consider whether its jurisdiction under the circumstances was founded, and held—1st, that C. being a native Englishwoman, was entitled, under the 27th section of the Divorce Act, to present her petition; 2ndly, that D. being a native English subject, could not shake off his liability to the authority of the laws of his own country, and pronounced for the jurisdiction.—*Deck* v. *Deck*, 90.

3. C., a native Englishwoman, married B. in England, and lived with him, partly in England, partly in Ireland. Cruelty was proved both in England and Ireland; adultery in Ireland. The citation was served on B.

DOMICIL—*continued.*

in England, where he was then living; he did not appear. Held, that C. was entitled to present her petition, and that it did not so distinctly appear in the evidence that B.'s domicil was Irish, as to oblige the Court to consider whether its jurisdiction over a foreigner cited, and not appearing, could be maintained. *Quære*, if a foreigner appears to a citation otherwise than under protest, does he submit himself to the jurisdiction of the Court?—*Bond* v. *Bond*, 93.

And as to the latter point, *Zycklinski* v. *Zycklinski*, 420.

4. Evidence of declarations made by the petitioner, accompanying acts done by him, is admissible to prove his intention of abandoning or acquiring a certain domicil. A *bonâ fide* residence of the husband in this country, not casual, or as a traveller, is sufficient to found the jurisdiction of this Court against the wife who has committed adultery in Australia during such residence. Whether such facts would constitute a new domicil for testamentary purposes is another question.—*Brodie* v. *Brodie*, 259.

ESTOPPEL. *See* LEGITIMACY.

A party is estopped from pleading the identical charges which had previously been in issue between the same parties in another suit, and of which proof had then failed, provided that in both suits the same evidence only would be admissible in respect of such charges.—*Sopwith* v. *Sopwith*, 160.

EVIDENCE. *See* ADJOURNMENT, 1, 2. ADULTERY, 7. AFFIDAVIT, 1, 4, 5. BIGAMY, 2. COLLUSION, 2. CONJUGAL RIGHTS, 3. COURT, 5. CRUELTY, 8. DOMICIL 4. PLEADING 1. PRACTICE 1 *a*, 9, 11, 21 *a*.

1. It is in the discretion of the Court to re-open a commission, so as to enable a witness who has been already examined, to be examined again, but it is a discretion to be sparingly exercised.—*Bevan* v. *M'Mahon and Bevan*, 55.

2. Where the husband had been served with a citation in England, and had not appeared, the Court refused to decide whether wife's evidence of the contents of letters written by her to her husband, after he had left her, was admissible, no notice to produce, etc., having been served; but suggested that in some cases such evidence might be admissible without service of notice.—*Case* v. *Case*, 65.

3. Declarations of members of the family in questions of legitimacy, made *post litem motam*, are not admissible, whether the *lis* be known or not known to the person making the declarations.—*Shedden* v. *Patrick*, 170.

4. Wife obtained a decree for judicial separation, on a verdict finding cruelty and desertion against the husband; the husband subsequently petitioned for dissolution of marriage by reason of the wife's adultery, who by her answer charged, *inter alia*, cruelty and desertion as in her original petition: issue joined, and at the trial her counsel tendered as evidence a certified copy under seal of the decree of judicial separation, in proof of the cruelty and desertion; but the Judge Ordinary refused to let it go to the Jury, on the ground that it would be indirectly making

EVIDENCE—*continued.*
use of evidence which was directly inadmissible in the then present trial.—*Stoate* v. *Stoate*, 223.
5. On a petition for a decree of nullity by reason of the malformation of the woman, neither the Court nor the parties are concluded by the terms of the report of the medical inspectors, but the inspectors themselves, and other medical men may be examined, *W*— v. *H*—, 241.
6. On a question of impotency, where no report of medical men as to the condition of the parties was before the Court, the evidence of medical men as to their examination of the persons of both parties during cohabitation was held to be admissible.—*Serrell* v. *Serrell and Bamford*, 422.

HUSBAND. *See* ABATEMENT, 3. ALIMONY. ATTACHMENT. CHILD, 5, 10. CONDONATION. CONJUGAL RIGHTS, 3. CONNIVANCE, 1. COSTS. DAMAGES, 2, 3. LUNATIC. SETTLEMENT.

INSURANCE ON LIFE. *See* ALIMONY, 7.

JUDICIAL SEPARATION. *See* CONJUGAL RIGHTS, 3. CONNIVANCE, 2. CRUELTY, 5. DESERTION. EVIDENCE, 4. LUNATIC, 2. PRACTICE, 6, 12, 13.

JURISDICTION. *See* CITATION, 2, 3. DOMICIL, 1, 2, 3, 4.

LEGITIMACY, DECLARATION OF. *See* EVIDENCE, 3. PRACTICE, 19.
To a petition under the Legitimacy Declaration Act, the Attorney-General is the necessary respondent; the petitioners have a right to have their case heard, as between themselves and him; and the parties cited *pro interesse suo*, cannot sustain a plea of *res judicata*, as between themselves and the petitioners, in bar of the whole proceedings. By the 10th section of the Legitimacy Declaration Act, 1858, the legislature probably intended to guard against the danger of disturbing former judgments, not to hinder a petition under the Act from being heard.—*Shedden* v. *H.M. Attorney-General and Patrick*, 170.

LIEN, ATTORNEY'S, FOR COSTS. *See* PRACTICE, 22.

LIS MOTA.
Declarations of members of the family in questions of legitimacy are not admissible *post litem motam*, whether the *lis* be known or not known to the person making the declarations; to constitute *lis mota* for this purpose, there must be more than the existence of the state of facts on which the claim is founded, or even of litigation on kindred matters; there must have been controversy in respect of the very point in dispute as to which the evidence is tendered.—*Shedden* v. *H.M. Attorney-General and Patrick*, 170.

LUNATIC.
1. The Court will not allow a husband to petition for dissolution of marriage with a lunatic wife, on the ground of adultery, alleged to have been committed before her lunacy.—*Bawden* v. *Bawden*, 417.

LUNATIC—*continued.*

2. The committee of a lunatic may maintain a suit for judicial separation, on the ground of the adultery of the wife of the lunatic.—*Woodgate* (Committee of Taylor) v. *Taylor*, 512.

MARRIAGE. *See* DOMICIL, 1. NULLITY OF MARRIAGE, 1.

1. The personal *status* resulting from a contract of marriage is to be ascertained by the law of the country in which the contract was made, and not by any special law of the country of the domicil of the parties to the marriage.—*Simonin* v. *Mallac*, 67.
2. To prove bigamy as a ground for a decree, proof must be given of such a ceremony as, but for the former marriage, would constitute a valid marriage.—*Burt* v. *Burt*, 88.

NEW TRIAL. *See* AFFIDAVIT, 5. PRACTICE, 16, 17.

1. The wife petitioned against the husband by reason of his cruelty, and he took issue thereon; he signed a letter consenting to a decree, on the suggestion of his solicitor, that if he did so, no evidence in support of the petition need be taken in Court. The issue came on for trial by a special jury, who found a verdict for the petitioner on her evidence and that of other witnesses. The respondent's letter was also put in evidence. The full Court affirmed, on appeal, the refusal of the Judge Ordinary to grant a rule *nisi* for a new trial, on the representation that the respondent was led, by the mistaken suggestion of his then solicitor, to withhold evidence contradictory of the petitioner's evidence, by which he alleged that his character as a gentleman and a man of honour was affected.—*Hill* v. *Hill*, 407.
2. The Court will not grant a new trial on the ground that the verdict was against the weight of evidence, unless it is dissatisfied with the verdict. Statement on affidavit that other evidence could be produced to the Jury on a new trial is not sufficient, if such evidence could, with reasonable diligence, have been obtained before.—*Miller* v. *Miller and Hicks*, 428.
3. Verdict on issues between the Queen's Proctor and the petitioner of adultery and collusion was found in favour of the petitioner. On motion for rule *nisi* for new trial, the Court read affidavits of the Queen's Proctor and of witnesses who had been called by him at the trial; the affidavits of the latter were, in substance, that they had told the truth, but not the whole of what they knew, and the Court refused a rule *nisi*.—*Gethin* v. *Gethin and the Queen's Proctor*, 560.

NULLITY OF MARRIAGE. *See* ABATEMENT, 1. DOMICIL, 1. EVIDENCE, 5, 6. MARRIAGE, 1. PRACTICE, 2.

1. B. and C., man and woman, both of full age, intending to marry, B., with the knowledge of C., in his statement to the Surrogate and affidavit in pursuance therewith, omitted one of C.'s names, gave her place of residence falsely, and falsely described his own residence and occupation, with the view, as alleged, of fraudulently obtaining the licence from the

NULLITY OF MARRIAGE—*continued.*

Surrogate. C. petitioned for a declaration of nullity, but the Court held the marriage to be valid, and confirmed the distinction between banns and licences which had been adverted to in previous cases.—*Bevan* (falsely called M'Mahon) v. *M'Mahon*, 230.

2. B. petitioned for a decree of nullity of marriage, on the ground that he had intercourse with his wife's mother before the fact of marriage with his alleged wife, which intercourse, he averred, brought him within the prohibited degrees of affinity in respect of marriage established by the law of England. On demurrer to this petition, the Court held that affinity could not be so constituted by the law of England, and that 28 Hen. VIII. c. 7, had been repealed, and not revived by any subsequent statute.

2 *a*. Held also, that a marriage solemnized in a vestry belonging to and abutting on the church was a good marriage, and that a marriage solemnized in the presence of one witness only is a good marriage. —*Wing* v. *Taylor* (falsely calling herself Wing), 278.

PETITIONER. *See* ABATEMENT, 2. ADJOURNMENT. ADULTERY, 3, 4, 6, 7. ALIMONY, 2, 4, 5. CHILD, 5, 8. COLLUSION, 2, 3. CONDUCT OF SUIT. CO-RESPONDENT, 2, 3, 4. COSTS, 6, 7, 10, 11. LEGITIMACY. LUNATIC.

PLEADING. *See* CONJUGAL RIGHTS, 1, 2. CRUELTY, 6, 7, 8. PRACTICE, 2, 5, 6, 9, 23, 24.

1. A paragraph of an answer to a petition for dissolution, alleged that in or about the month of ——, 18—, the said A. B. left his house at Brixworth, in the county of ——, where the said respondent was then living with him, without any reasonable cause, and deserted the said C. D. The replication simply took issue on this; at the hearing, evidence was offered to prove that A. B. had reasonable grounds for leaving C. D. It was objected that if such evidence was intended to be used, the replication should have averred reasonable cause, instead of simply taking issue apparently on the fact of desertion; but the Court held that the evidence was admissible under the replication.—*Goode* v. *Goode and Hansom*, 253 *n*.
2. If the respondent appear absolutely and obtain further time to answer, he cannot plead to the jurisdiction, nor any plea but to the merits.—*Zycklinski* v. *Zycklinski*, 420.
3. Where the co-respondent charged the petitioner with having committed adultery with three females, named, without time or place, in one and same paragraph of the answer, the Court refused to let the answer be amended by alleging the adultery with each of the three females, in three distinct paragraphs, with time and place, on the ground that the inconvenience arising from the mode of pleading might be corrected by applying for particulars.—*Hunt* v. *Hunt and Duke*, 574.
4. Collusion between the petitioner and respondent is a good plea pleaded by the Queen's Proctor; but the party will be entitled, on summons, to a statement of character of the collusion intended to be proved.—*Jessop* v. *Jessop*, 301.

PRACTICE. *See* ADJOURNMENT. ABATEMENT. AFFIDAVIT, 1. ATTACHMENT. CITATION, 1. COLLUSION, 1. CONDONATION, 3. CO-RESPONDENT, 1, 2, 3, 4. COSTS. COURT, 5. EVIDENCE.

1. Where a respondent, in her answer, has not traversed the adultery alleged in the petition, but sets up counter-charges of adultery, cruelty, and misconduct, upon which issue has been joined, upon a trial of these issues before a Jury, it is for the respondent to begin.

   1 *a*. Where these issues have been disposed of by the Jury, it is not competent to the respondent to cross-examine the witnesses called to establish the allegations in the petition, either as to these allegations or as to the counter-charges contained in the answer.—*Bacon* v. *Bacon and Bacon*, 53.

2. A husband petitioned for dissolution of marriage by reason of his wife's adultery; she denied the adultery, alleged nullity of marriage by reason of the husband's impotency, and prayed for a decree of nullity. At the hearing, respondent's counsel claimed to begin on the question of nullity; but the Court held, that as the respondent had traversed, though argumentatively, the marriage alleged by the petitioner, he had a right to begin.—*Serrell* v. *Serrell and Bamford*, 422.

3. Where the wife's petition for restitution of conjugal rights is heard before the Court without a Jury, her counsel have a right to begin, though the substantive issue may be raised on the husband's answer.—*Burroughs* v. *Burroughs*, 544.

4. The Queen's Proctor, under direction of the Attorney-General, may move the Court by counsel, without affidavit, for leave to intervene in a divorce suit; but if he moves to have the hearing of the petition postponed that he may have time to plead, that part of the motion must be founded on affidavit, and notice given to the other parties.—*Anonymous*, 249.

5. Where, after a decree *nisi* for dissolution, the Queen's Proctor has obtained leave to intervene, and has pleaded an admissible plea, the petitioner will not be allowed to withdraw from a full investigation of the matters alleged by taking the petition off the file. *Quære*, if the petitioner had prayed to dismiss her petition on payment by her of the costs incurred up to that time by the Queen's Proctor's intervention.—*Gray* v. *Gray*, 266.

6. Where the petitioner petitions for dissolution, and the Queen's Proctor intervenes and pleads the petitioner's adultery, the petitioner cannot amend the prayer of her petition by substituting judicial separation for dissolution, so as to defeat the Queen's Proctor's right to take part in the proceedings.—*Drummond* v. *Drummond*, 269.

7. Where, on application to make absolute a rule *nisi* for dissolution, it appeared that affidavits had been filed by the respondent, which stated the petitioner's bigamy, the Court refused to make the decree absolute, and directed the registrar to inform the Queen's Proctor that such affidavits had been filed, and permitted the petitioner to file affidavits in answer.—*Boulton* v. *Boulton and Page*, 405.

PRACTICE—*continued.*

8. The wife petitioned for dissolution; the husband made no answer; the hearing of the petition had been adjourned for further proof, pending which the Queen's Proctor had intervened and alleged the petitioner's adultery, who took issue thereon, and the Court allowed the proof of the original petition to be completed, and the issue, as between the petitioner and Queen's Proctor, to be set down for trial by Jury, retaining the same position in the cause list as the original petition.—*Gethin* v. *Gethin*, 406.
9. If the Queen's Proctor intervenes by leave of the Court, pleads to the petition, and the petitioner replies, whereby issues are raised on the record, the Court will not generally allow such issues to be decided by affidavit; but if the Queen's Proctor, under the first branch of section 7 of 23 & 24 Vict. c. 144, as one of the public, enters an appearance and shows cause against a decree *nisi* being made absolute, he may proceed to file affidavits under Rule 18, and on those and counter affidavits, if filed, the question may be argued under the direction of the Judge Ordinary.—*Boulton* v. *Boulton and Page*, 551.
10. On motion for an interim order for custody of children, the Court will not allow affidavits to be read which tend to prove the truth or falsehood of the charges respectively brought against each other by the parties to the suit.—*Ryder* v. *Ryder*, 227.
11. Proof to satisfy the Court that a witness, whose evidence has been taken abroad under a commission, is out of the jurisdiction when the evidence is tendered, may be less stringent where the witness is resident abroad than where the evidence has been taken of a witness going out of the jurisdiction for a temporary purpose; and where the affidavit to found the order for the commission had stated that the object was to examine A. B., resident abroad, and the order was served on the co-respondents, the Court held that the presumption was that the witness continued abroad, unless the contrary were shown.—*Mills* v. *Mills*, 310; *Pollack* v. *Pollack and Deane and M'Namara*, 310.
12. A petition was filed and citation issued on the part of a wife for judicial separation on the ground of cruelty; neither the petition nor citation were served. The wife's solicitor, in consequence of fresh instructions, afterwards filed a second petition for judicial separation, on the ground of adultery and cruelty, and a citation issued thereon; the husband was served, and entered an appearance in the second suit: the Court directed the second suit to be proceeded with.—*Turner* v. *Turner*, 426.
13. The Court, on ascertaining that the wife's proctor had not received the costs in the former suit, allowed her petition for judicial separation to be withdrawn, and a petition for dissolution to be filed.—*Ashley* v. *Ashley*, 388.
14. The respondent cannot show cause against the decree *nisi* being made absolute.—*Latham* v. *Latham and Gethin*, 299; *Stoate* v. *Stoate*, 384.
15. Where the husband moved to have the decree *nisi* made absolute, he being resident in India, and it appeared that a sum of money was due to the wife on account of alimony *pendente lite*, the Court refused to make the decree absolute.—*Latham* v. *Latham and Gethin*, 299.

PRACTICE—*continued.*

16. Where a verdict has been found for the respondent, the Court will not dismiss the petition till the month allowed by the rules for moving for a new trial has elapsed.—*Hitchcock* v. *Hitchcock*, 513.

17. A motion to dismiss petition after a verdict for the respondent, should be supported by an affidavit that no application for a new trial has been lodged in the registry.—*Hill* v. *Hill and Wood*, 515.

18. The Court will not postpone the trial of a cause on the application of one of the parties, if no notice of the motion has been given to the other party.—*Hepworth* v. *Hepworth*, 514.

19. The Court will generally, at the request of either party, direct issues raised on a petition for declaration of legitimacy to be tried by a jury.—*Re the Petition of Bouverie*, 548.

20. Three calendar months must have elapsed after the date of the decree *nisi*, before search is made in the registry to ascertain whether any appearance, etc., has been entered against its being made absolute.

20 *a*. Where affidavits in support of a motion omit to state material facts which existed at the date when the affidavit was made, the Court is inclined to allow such motion to stand over; but if the motion cannot be granted by reason of the non-existence at the date of the affidavit of material facts, such motion must be rejected.—*Serrell* v. *Serrell and Bamford*, 636.

21. The Court ordered papers in the possession of the husband, but alleged to be material to the conduct of the wife's suit, to be produced by husband's attorney to the wife's attorney, the latter to be at liberty to take copies, but reserved the question of costs of the motion, as no application for this purpose had been made to the husband before notice of motion given.

21 *a*. An application for a commission to examine witnesses is premature before issue joined.—*Shaw* v. *Shaw*, 642.

22. On non-payment of certain sums due by way of alimony and costs, a writ of sequestration issued against the respondent's property, and an order was made on K. to pay into Court a sum of money awarded in an action in the Queen's Bench to be paid by K. to the respondent; on motion, on behalf of the petitioner, to order such sum to be paid out in part satisfaction of her attorney's taxed costs and her own alimony, the Court refused to make such order, H. and F., respondent's attorneys in the action in the Queen's Bench, having satisfied the Court on affidavit that they had a lien for costs in that cause, exceeding the sum so paid into Court.—*Munt* v. *Munt*, 661.

23. *Semble:* a party is not at liberty to traverse and demur at the same time without leave of the Court.—Compare *Bevan* v. *M'Mahon and Bevan*, 59 *n.*, with *Leete* v. *Leete*, 571.

24. The Court may be moved to set aside demurrers as frivolous.—*Leete* v. *Leete*, 570.

QUEEN'S PROCTOR. *See* ADULTERY, 4. AFFIDAVIT, 4. COLLUSION. CONDUCT OF SUIT. CONNIVANCE. COSTS, 10, 11, 12. NEW TRIAL, 3. PLEADING, 4. PRACTICE, 4, 5, 6, 7, 8, 9.

RES ADJUDICATA. *See* ESTOPPEL. LEGITIMACY.

RESPONDENT. *See* ADULTERY, 7. ALIMONY, 2. ATTACHMENT, 4. COLLUSION. CONDONATION, 2. CONDUCT OF SUIT. CONJUGAL RIGHTS, 1, 2. COSTS, 13, 14, 15, 16. LEGITIMACY. LUNATIC. NEW TRIAL, 1. PLEADING, 2.

Where the petitioner's case, the wife, respondent, not having appeared, was adjourned for further evidence, the Court, under special circumstances, allowed the respondent to appear and defend the whole case.

RIGHT TO BEGIN. *See* PRACTICE, 1, 2, 3.

SETTLEMENT OF GUILTY WIFE'S PROPERTY.

On a decree of dissolution by reason of the wife's adultery, the Court directed two-thirds of the bulk of certain property, to which she was entitled under certain trusts, to be settled on the children immediately, and the remaining third after her death.—*Bacon* v. *Bacon and Bacon*, 86.

SETTLEMENT for maintenance of adulterous wife.—*Bent* v. *Bent and Footman*, 392.

SETTLEMENT, *ante-* or *post*-nuptial. *See* CHILD, 8, 9.

1. The Court has no power to deal with marriage settlements, unless there are children of the marriage.—*Thomas* v. *Thomas*, 89.
2. Where, on dissolution at the suit of the wife, the husband had an interest in the wife's money under settlement, the Court directed the application of such interest in favour of the mother and child.—*Boynton* v. *Boynton*, 275.
3. The Court will make no order respecting settled property after dissolution of the marriage by reason of the wife's adultery, to deprive the husband of any benefit derived from the settlement.—*Thompson* v. *Thompson and Barras*, 649.

WIFE. *See* ADULTERY, 4. ALIMONY. CHILD, 5, 6, 7, 9, 10. CONDONATION. COSTS, 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 16. CRUELTY, 3, 4, 5, 9. DESERTION. DOMICIL, 2, 3. LUNATIC.

END OF VOL. II.

JOHN EDWARD TAYLOR, PRINTER,
LITTLE QUEEN STREET LINCOLN'S INN FIELDS.

JUDGES AND LAW OFFICERS.

Judge of Her Majesty's Court of Probate.

Right Hon. Sir CRESSWELL CRESSWELL.

Judges of Her Majesty's Court for Divorce and Matrimonial Causes.

1858–9.

The Lord Chancellor, The Lord Chief Justice of the Court of Queen's Bench, The Lord Chief Justice of the Court of Common Pleas, The Lord Chief Baron of the Court of Exchequer, The Senior Puisne Judge in the three last-mentioned Courts, and The Judge of H.M. Court of Probate by the title of Judge Ordinary; any two of whom, with The Judge Ordinary, to form the Full Court.

1859–60.

In addition to the above,

All the other Judges for the time being of the Courts of Queen's Bench, Common Pleas, and Exchequer, respectively; The Judge Ordinary taking precedence next after The Lord Chief Baron of the Court of Exchequer. But since the 28th August, 1860, by 23 & 24 Vict. c. 144, and 25 & 26 Vict. c. 81, The Judge Ordinary may, either alone or in conjunction with one Judge of the Court, exercise all the powers previously vested in the Full Court.

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ERRATA ET CORRIGENDA.

It is incorrectly stated, in the goods of Robert Noddings, p. 17, that "the grant will be made accordingly:" the effect of that decision being, that the executor of the acting executor was the proper representative of the original testator, no fresh grant was needed, and none in fact was made. In similar cases it is understood that the citation is filed in the Registry when returned, and an entry of no appearance having been entered to it is made; it is presumed that on the production of an office copy of such entry, the Bank of England would consider the non-acting executor as accounted for, and recognize the continuance of the chain of executorship in the executor of the acting executor.

At page 50, line 3, *strike out* "before the Judge Ordinary."

At page 86, in head-note to Bacon *v.* Bacon and Bacon, *strike out* "Costs."

In the goods of Thomas Tucker, p. 123, it afterwards turned out that the Chester Probate was in terms limited to the goods within the diocese, and the citation was thereupon ordered to issue.

At page 342, line 22, it is incorrectly stated, "the Court put its seal to the confirmation." That the Court should put its seal was one of the terms of the compromise; but the parties were unable to agree as to the effect to be given to these terms. See further stages of the same case, page 614.

At page 419, 1st line of Quicke *v.* Quicke, *for* "with" *read* "without."

At page 424, line 10, *for* "defendant's" *read* "petitioner's."

At page 574, in line 3 of note, *for* "petition" *read* "answer."

G/8

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